THE MADRAS LAW JOURNAL

Mohan, J.

Ramakkavundan v. The Manager, Co-operative Credit Society, Perambur.

28*th October*, 1975. S.A. No. 1249 of 1972.

Tamil Nadu Co-operative Societies Act (LIII of 1961), section 100—Civil Court—Validity of an award—Whether can be gone into.

Section 100 of the Tamil Nadu Co-operative Societies Act clearly lays down that no award passed under the Act shall be liable to be called in question in any Court. From this it will clearly follow that the validity of an award, be it against a member or a non-member cannot be gone into in civil proceedings. The question whether the plaintiff is a member or not will have to be agitated before the authorities concerned *viz.* Deputy Registrar and the civil Court cannot entertain such a plea.

K. Raman, for Appellant.

R.S. ——— *Appeal dismissed.*

N. S. Ramaswami, J.

Johra Bi v. Shakuntala.

30*th October*, 1975.

C.M.A. No. 522 of 1974.

Tamil Nadu City Tenant's Protection Act (III of 1922) as amended by Act (XXIV of 1973)—Landlord's suit for ejectment against tenant—Application under section 9—Delay of sixty days—Suit decreed—Appeal by tenant—Amending Act IV of 1972—Deletion of proviso to section 12 of Act XXIV of 1973 coming into force—Tenant if entitled to maintain application without an application to excuse the delay.

The Madras City Tenant's Protection (Amendment) Act of 1972 (IV of 1972) deleted the proviso to section 12 of the parent Act. Because of such deletion, the tenant in the case got a right to apply under section 9 for relief. No doubt he had applied ever before the amendment. Under the present definition of the word "Tenant" in sub-section (4) of section 2 as amended by Act XXIV of 1973, a person who gets a right to the benefits of the Act, because of the deletion of the proviso to the section is also included, provided he continues in actual physical possession of the land and the building. The amendment made by Act XXIV of 1973 to section 9 of the parent Act says that any such person as referred to above, is entitled to file an application for necessary relief under the parent Act within two months from the date of the publication of the said amendment Act. The present application having beer filed very much prior to the coming into force of the Amending Act XXIV of 1973, there is no difficulty in holding that such an application is maintainable, even without an application to excuse the delay.

Abdul Hadi, for Appellant.

K.N. Balasubramanian, for Respondent.

R.S. ——— *Appeal dismissed.*

N. S. Ramaswami, J.

N. K. S. Rajarathinam Chettiar v. The Regional Director, Employees' State Insurance Corporation, Madras.

3*rd November*, 1975.

A.A.O. No. 301 and 302 of 1975.

Employees' State Insurance Act (XXXIV of 1948), section 2 (12)—Flour Mill—Whether factory under the Act—Employer whether a person employed for wages.

Under the definition (of 'factory') in the Employees' State Insurance Act as it stands after the amendment by Act XLIV of 1966, the mere fact that twenty or more persons are working or were work-

ing on any day of the preceding twelve months, would not be sufficient for making it a factory. The persons working should be working for wages, the word 'wages' being defined under section 2 (22) of the Act (XXXIV of 1948).

In the instant case, there were nineteen persons working in the premises excluding the employer. The employer was not shown as receiving any wages on any day during the relevant period. On the question whether the premises was a factory.

Held, the employer was certainly not to be counted in order to determine whether the premises was a factory or not. If the employer was left out from counting, then only nineteen persons were found working on the relevant dates, and therefore, the premises would not come under the definition of the word 'factory'.

V. S. Ramakrishnan, for Appellant.

S.J. *Appeals allowed.*

Veeraswami, CJ. and *Natarajan, J.*

S. Sherfudeen *v.* C. P. Ramachand.

6*th November*, 1975.

W.A. No. 271 of 1975.

Tamil Nadu District Municipalities Act (V of 1920), section 31—Chairman of Municipal Council—Resignation—Notice to Commissioner and not to Council—Letter of resignation—placed before Council—Proper statutory procedure.

Section 31 of the Tamil Nadu District Municipalities Act says that the Chairman may resign "by giving notice to the Council and that such resignation shall take effect from the date on which it is placed before the Council. It is clear, therefore, that the statutory requirement is that the resignation to take effect must be by notice and the notice should be to the Council and lastly, it should be placed before the Council, so that from the time of doing so, the resignation may take effect. When a statute requires a certain procedure to be followed for resignation of the office of Chairman to take effect, it has to be complied with. If the notice was not addressed to the Council but only to the Commissioner, that will not be a compliance with the statutory procedure. When the statute says that the resignation should be by notice to the Council, it cannot be said that the resignation by notice to the Commissioner though it was eventually placed before the Council is sufficient compliance with the statute.

K. K. Venugopal, for Appellant.

T. L. Ram Mohan, for Respondent.

R.S. *Appeal dismissed.*

Paul, J.

Chinnaswamy Reddiar *v.* Krishnamoorthi Reddiar.

10*th November*, 1975.

A.A.A.O. Nos. 96 and 105 of 1974.

Hindu Law—Joint family property—Execution of decree against father—Son's share whether can be sold in execution—Theory of pious obligation—Son not a party to decree—Son's share liable.

Under the doctrine of pious obligation, a son is bound to discharge the debts of his father and even if he is not *eo nomine* a party to the decree, his share of the family property could be brought to sale in execution of the decree obtained against the father.

R. S. Venkatachari, for Appellant.

S. J. *Appeals allowed.*

Ramaprasada Rao and
Ratnavel Pandian, JJ.

Collector of Madras *v.* K. Gokale.

7th November, 1975.

A.S. No. 740 of 1970.

Land Acquisition Act (*I of* 1894), *section* 25 (1), (2) and (3)—*Compensation—Court awarding compensation exceeding the amount claimed—Whether can be done.*

The rigour of section 25 (2) of the Land Acquisition Act is mitigated by section 25 (3), according to the Court, on being satisfied that there was sufficient reason for the claimant's lapse under section 25 (3), can award a sum in excess of the amount awarded by the Collector. Thus, the Court on being satisfied about the *bona fides* of the claimant's conduct can remedy the penalty imposed by section 25 (2) and grant in excess of what has been awarded by the Land Acquisition Officer.

Held, that the lower court enhancing the compensation in excess of the amount claimed, is opposed to the provisions of section 25.

G. R. Lakshmanan, for Government Pleader, for Appellant.

N. R. Chandran, for Respondent.

R.S. ——— *Appeal partly allowed.*

V. Ramaswami and
V. Sethuraman, JJ.

State of Tamil Nadu by Commissioner of Commercial Taxes, Madurai *v.* Narayana Nadar & Co.

12th November, 1975.

T.C.N. 23 of 1971.

Tamil Nadu General Sales Tax Act (*I of* 1959), *section* 2 (g) *and* (k)—*Assessee—Commission agent—Produce brought by agriculturist producer—Sold part of goods on commission account—Transferred to 'self' account small portion for own business—Commission agent liable to pay sales tax.*

The definition of dealer in section 2 (g) of the Tamil Nadu General Sales Tax Act includes a commission agent and the definition of turnover in section 2 (k) takes within the aggregate amount for which the goods are bought or sold by a dealer, either directly or through another, on his own or on account of others. Therefore a commission agent in respect of his turnover as commission would be liable to pay sales tax.

K. Venkataswamy, 1st Additional Government Pleader, for Petitioner.

B. Rajagopalan, for Respondent.

R.S. ——— *Revision allowed.*

Ramanujam, J.

N. Shanmughavelu *v.* The State of Tamil Nadu.

14th November, 1975.

W.P. No. 5000 of 1975.

Tamil Nadu Panchayat Councils Establishment Rules, rule 22—*Senior Basic Grade Teacher—Working as Headmaster—Order by Government to revert the teacher—Validity.*

The petitioner was a qualified Senior Basic Grade Teacher and was working as Headmaster. The Government passed an order by which the petitioner was proposed to be reverted. The petitioner challenged the validity of the order as contrary to rule 22 of the Tamil Nadu Panchayat Union Councils Establishment Rules.

Held, So long as rule 22 stands as it is, the Government cannot, by an executive order provide for a different mode or basis for promotion to the posts of Middle School Headmasters who are governed by rule 22. Further the G.O. did not purport to have been passed by the Government in exercise of its rule making authority under section 58 (of the Tamil Nadu Panchayats Act). Therefore, the impugned G.O. which is in conflict with rule 22 of the Tamil Nadu Panchayat Union Councils Establishment Rules, cannot be applied to the petitioner. Promotions to the posts of Middle School Headmaster have to be made strictly in accordance with seniority as provided under rule 22.

R. S. Subramaniam, for Petitioner.

S.J. ——— *Petition allowed.*

Ramaprasada Rao and
Ratnavel Pandian, JJ.

Santhana Venugopala Krishnan v. K V. Venugopal.

20th November, 1975.

A.S. No. 264 of 1969.

Hindu Law—Alienation of family property by father—Manager—Legal necessity—Minor sons—Suit for partition—Alienations challenged on the ground of no legal necessity—Burden on the minor—Nature of proof.

The mere *ipse dixit* of the plaintiff as soon as he becomes a major basing his information on heresay and gathering some witnesses who would parrot—like repeat what he wants them to say would not improve the position. Antecedent debts have special significance. It is therefore essential that in such connection where alienations are made to pay antecedent debts recited in a registered and old document as existing debts of the family, the minor should be in a position to bring home to the Court that there was no occasion for the father, manager or any other manager of the joint family to involve himself in such enterepreneurship. For this purpose, he must be in a position to prove what would be the income from the joint family properties and that after meeting the generality of expenses connected with the family there could have been available surplus, the existence of which cannot prompt respectable persons to borrow unnecessarily or to mortgage unnecessarily the family properties so as to ultimately burden them. It would be a practical impossibility for the alienees who are brought to the threshold of the Court on the facts adverted to by the minor challenging coparcener to prove that the consideration which passed under one or other alienation made by the father manager was rightfully or properly utilised by their vendors. It would be unreasonable to expect such meticulous proof of appropriation and treatment of such consideration nearly 15 or 20 years after the date of such alienation.

The challenges made by the minor in the matter of alienation or borrowings made by their elders including their father cannot lightly be accepted by Courts unless the facts in each of the cases do satisfy the terms laid down by the various decisions.

N. Sivamani, for Appellant.

S. Somasundar, P. S. Srisailam and *C. Chinnaswami,* for Respondents.

R.S. ——— *Appeal dismissed.*

Natarajan, J.

Vasavambal v. Nataraja Chettiar.

24th November, 1975.

S.A. No. 185 of 1975 and
C.M.P. No. 13079 of 1975.

Partition Act (IV of 1893), *sections* 2, 3 *and* 4 *—Money decree—Execution—Judgment debtor's one third share in house brought to sale —Purchased by decree-holder—Symbolical delivery of possession—Suit for partition of the one third share in the house—Preliminary decree—Application for passing of final decree —Commissioner appointed—House incapable of division—Direction to proceed under the Partition Act—No application under section* 2 *—Commissioner fixing the value of the property—No objection by the parties to the valuation—Court accepting the valuation of the Commissioner—Representation by a member of the family—Willing to take the entire house and pay the other shareholders—Court accepting offer and directing to deposit the amount —Propriety of order.*

The Partition Act, is indeed a curious piece of legislation and on more than one occasion, Courts have found the provisions of the Act to be illogical and unrealistic. Sections 2 and 3 of the Partition Act lay down that when a request for sale of a property is mooted by one or more share holders owning a moiety or upwards therein, a share holder other than the party applying under section 2 would be entitled to apply for leave to buy at a valuation the share or shares of the party or parties asking for a sale. The effect of section 3 of the Act was to favour the smaller shareholder at the expense of the larger. It is on account of these

factors Courts have been forced to apply the provisions of the Act rigidly and strictly lest by free and loose resort to the provisions of the Act, they should abdicate their powers to implement a decree for partition in a most equitable and just way that could render substantial justice to all the parties concerned. Time and again therefore Courts have laid down that they can rely on land invoke their own inherent powers to effect a division in a manner found by them to be pragmatic as well as equitable. When no application under section 2 was filed the Court has no jurisdiction to impose a forced sale of the house upon the members of the family. The parties to the suit either singly or conjointly would be entitled to make an application under section 2, for the section contemplates the application being made by the " shareholders interested individually or collectively to the extent of one moiety or upwards " in the property. The Court was obliged to value the share or shares of the party or parties asking for a sale and offer the same to that shareholder who was willing to pay the share ascertained by the Court. An open sale cannot and ought not to be held.

Held, that no error had been committed by the lower Court and the Court did not direct a sale of the shares of the other shareholders of the house to the third party, but only allotted the house in its entirety to him.

M. N. Padmanabhan and *M. A. Adishesan*, for Appellant.

T. R. Rajagopalan and *T. R. Rajaram*, for Respondent.

R.S. ——— *Appeal dismissed.*

Mohan, J.

VE. A. Vairavan Chettiar *v.* N. Neelakantan.

9th December, 1975.

C.R.P. No. 1625 of 1972.

Motor Vehicles Act (IV of 1939), *section* 48—*Stage carriage permit—Grant of—Town route—Preference on ground of local enterprise—Valid.*

The petitioner was an applicant before the Regional Transport Authority for the grant of a stage carriage permit on the Town Service Route Vriddachalam to Pennadam. The petitioner's application was rejected on the ground that a local enterprise should be preferred and the petitioner was a resident of Chidambaram far away from the route. On appeal, the State Transport Applleate Tribunal allowed the appeal of the second respondent herein. The petitioner filed a revision on the ground that he should not have been rejected purely on the ground he was not a local enterprise,

Held, having regard to the fact that this was a town route, certainly it was open to the authorities to prefer a local enterprise and hence the order could not be said to be vitiated on that ground.

V. Subramanian and *S. K. Mylswami*, for Petitioner.

S.J. ——— *Petition dismissed.*

N. S. Ramaswami, J.

Pichaivel Odayar *v.* Sundaravelu.

9th December, 1975.

C.M.A. No. 587 of 1975.

Tamil Nadu Indebted Agriculturists (Temporary Relief) Act (X of 1975), *section* 2 (c)—*Suit for partition—Compromise—Appellant ordered to pay money to respondent—Portion of the money remaining unpaid—Whether debt under the Act—Execution—Application under section* 4 *by appellant—Dismissal whether correct.*

The Respondent had filed a suit for partition of certain properties and there was a compromise decree under which the properties were taken over by the appellant and in lieu thereof, a sum of

Rs. 13,500 was to be paid to the respondent herein. A sum of Rs. 3,500 had already been paid and execution was levied for the balance of Rs. 10,000. The appellant filed an application under Section 4 of Act X of 1975. On the question whether the sum of Rs. 10,000 is a debt as defined under the Act.

Held, that the decree is not for a debt as defined under the Act.

R. Sundaralingam, for Appellant.

G. Ramaswami and *M. A. Sadanand,* for Respondent.

S.J. ———— *Appeal dismissed.*

Varadarajan, J.

Chandrasekharan Pillai v. T. V. Ramamoorthi Iyer.

9th December, 1975.

S.A. No. 1850 of 1972.

Negotiable Instruments Act (XXVI of 1881), *section* 98 (c)*—Suit for recovery of money—Cheque given by respondent—Returned by Bank with remarks 'not arranged for'—Suit filed—Notice of dishonour not issued Suit whether maintainable.*

The plaintiff had filed a suit for recovery of money on the foot of a cheque alleged to have been issued to him by the respondent on account of purchase of paddy. The respondent contended that the cheque was given for some other purpose. The trial Court decreed the suit. But the lower appellate Court found that the cheque was not for the price of paddy sold and allowed the appeal and dismissed the suit. The lower appellate Court had also held that the suit was not maintainable as there was no notice of dishonour as required under section 98 (c) of the Negotiable Instruments Act. On second appeal by plaintiff,

Held, having regard to the circumstances the lower appellate Court was justified in accepting the case of the respondent that the cheque had not been given for the purchase of any paddy.

Having regard to the terms of section 98 (*c*) of the Negotiable Instruments Act, no notice of dishonour was necessary, as the respondent could not be stated to have suffered any damage for want of notice, if he had really issued the cheque for the purchase of paday from the appellant.

V. Sridevan, for Appellant.

S.J. ———— *Appeal dismissed.*

Ismail, J.

Sri Karpaga Vinayagar Devasthanam *v.* Rajagopal Mudaliar.

9th December, 1975.

S.A. Nos. 2066 and 2067 1972.

Indian Registration Act (XVI of 1908), *section* 17*—Evidence Act (I of* 1872), *section* 64*—Lease deed not registered under Registration Act—Inadmissible to prove the terms of tenancy—Admissible to prove character of possession.*

The respondents had taken the suit sites on lease from the appellant under two lease deeds. Contending that the respondents had failed to pay the rent and denied the title of the appellant to the suit property, suits were instituted for recovery of possession, for damages and for mandatory injunction for removal of the superstructure. The trial Court decreed the suit, but on appeal, the lower appellate Court dismissed the suit on the ground that the two lease deeds were for a period of two years and were not registered as required under the Registration Act and consequently were not admissible in evidence and directed the appellant herein to take separate proceedings for establishing title. The plaintiff preferred second appeals.

Held, The lease deeds were admissible in evidence to prove that the respondents herein were in possession of the suit sites only as tenants of the appellant. Once that is established, they could not deny the title of the appellant herein and having denied the title, they were liable to be evicted. The second appeals were allowed.

M. Srinivasan, for Appellant.

S.J. *Appeals allowed.*

Ismail, J.

Chinnaraju Gounder *v.* Munia Gounder.

10*th December*, 1975.

S.A. No. 2076 of 1972.

Hindu Law—Joint family property—Suit for partition—Property sold in Court auction—Purchase by outsider—Property repurchased by family member—Allegation that purchase by outsider was benami.

In a Court auction sale, the properties belonging to the family were sold and an outsider purchased the properties. From that outsider, a member of the family purchased the properties. The plaintiff filed a suit for partition of the family properties alleging that the purchase by the outsider was actually benami and that the joint family furnished the funds. The Trial Court decreed the suit but this was reversed by the first appellate Court. On further appeal by the plaintiff,

Held, The burden was on the appellant to establish that the outsider who purchased the property was only a namelender and it was the joint family which furnished the funds for the purchase of the properties in question. The learned District Judge held that the appellant had not established this allegation of the joint family furnishing funds. The conclusion of the lower appellate Court could not be said to be erroneous. The second appeal fails.

M. Jeevarathnam, for Appellant.

P. R. Varadarajan, for Respondents.

S.J. ——— *Appeal dismissed.*

Varadarajan, J.

Mahadevan *v.* Duraikannu Ammal.

10*th December*, 1975.

C.R.P. Nos. 3180 and 3181 of 1975.

Tamil Nadu House Building (Lease and Rent Control) Act (XVIII of 1960), *section* 14 (1) (b)—*Application for eviction—Demolition and reconstruction—Prior petition dismissed—Present petition whether* bona fide.

A landlady filed eviction petitions against the tenants on the ground that the premises was required for demolition and reconstruction and these were ordered. The lower Appellate Authority had observed that it was admitted that the building was 90 years old and had developed cracks at various places and this was supported by the fact that a notice had been issued by the Corporation of Madras to the landlady to carry out repairs immediately. The petitioners contended in these petitions that the landlady failed in a prior petition on the same ground and that the landlady was not entitled to file the present petitions.

Held, it could not be stated that the Authorities below erred in accepting the landlady's case that the requirement of the premises was *bona fide*.

M. Srinivasan, for Petitioners.

S.J. ——— *Petitions dismissed.*

Ramanujam, J.

C. Natesan *v.* The Parvathipuram Panchayat.

10*th December*, 1975.

C.R.P. No. 3133 of 1974.

Tamil Nadu Panchayat Act (XXXV of 1958), *section* 26 (1)—*Member—Failure to pay housetax within time—Suffering disqualification—Notice issued by Executive officer—Subsequent payment of house tax—Whether removes disqualification.*

The petitioner was elected member of a Panchayat in 1970. In August, 1973, he was served with a notice by the Executive officer intimating that he had

suffered disqualification under section 26 (1) of the Panchayat Act for non-payment of house tax within three months of the tax becoming due. The petitioner later on paid the tax said to be due by him. With a view to get over the notice issued to him by the executive officer, the petitioner approached the judicial authority for a declaration that he was not disqualified. However, the judicial authority held that the petitioner had actually suffered disqualification and his subsequent payment would not cure the disqualification.

Held, In view of the fact that the petitioner had failed to pay the arrears of tax within three months after it became due, the petitioner had to suffer the disqualification under section 26 (1) of the Act. The order of the Judicial Authority was therefere correct.

R. Desikan, for Petitioner.

S.J. ——— *Petition dismissed.*

Ramanujam, J.

Govinda Padayachi *v.* R. Ranganatha Padayachi.

10*th December*, 1975.

S.A. No. 2052 of 1975.

Hindu Law—Marriage according to custom of community and living as husband and wife for more than 35 years—Presumption of marriage arises—Indian Evidence Act (I of 1872), section 114.

The plaintiff filed a suit for a declaration that the first defendant was not a legitimate son of his father. As against this, the first defendant let in evidence to show that his mother married his father and they both lived as husband and wife for 35 years. Both the Courts below accepted the defence case that there was a valid marriage and that the first defendant was born of this wedlock. On Second Appeal by the plaintiff,

Held, the Courts below were justified in invoking the presumption of marriage arising from the cohabitation of the spouses and their living as husband and wife for well over 35 years.

T. Fenn Walter, for Appellant.

S.J. ——— *Appeal dismissed.*

K. Veeraswami, CJ. and *Natarajan, J.*

Guruswamy v. State of Tamil Nadu.

16th December, 1975.

R.C. Nos. 5 to 13 of 1974.

Defence of India Rules (1971), *rule* 114 (2)—*Tamil Nadu Essential Commodities (Display of Stocks and Prices and Maintenance of Accounts) Order*, 1973—*Validity of —Formation of opinion — Condition precedent.*

The question relates to the validity of the Tamil Nadu Essential Commodities (Display of Stocks and Prices and Maintenance of Accounts) Order, 1973. The ground on which the order is said to be invalid is that the condition precedent, namely, the formation of opinion by Government that it is necessary or expedient to make the order in terms of rule 114 (2) of the Defence of India Rules, 1971, had not been complied with.

Held, It is found from the relative files that an all parties conference was held at Madras on 27th August, 1973 at which a decision was taken and the impugned order was made in pursuance of that decision. Not merely the Department was concerned in the formation of opinion but the matter was dealt with at the level of Ministers as well. It is, therefore, clear that the condition precedent as to the formation of opinion was complied with in this case. That being so, the impugned order is valid.

C. D. Sekkizhar, for Accused.

S. J. — *Reference answered accordingly.*

Mohan, J.

Munisami Naidu v. C. Ranganathan.

17th December, 1975.

S.A. No. 1835 of 1975.

Lease—Suit for declaration of title and delivery of possession—Lease for a period of five years—Tenant in arrears of rent and denying title—Tenant claiming to be cultivating tenant —Lower appellate Court decreeing suit in full —Appeal by tenant—Dismissed.

A suit was filed for a declaration of title and recovery of possession of the suit property. The plaintiff had got the property under a settlement deed Exhibit A-1. Even earlier to this, under Exhibit A-3, the properties had been leased in favour of the defendant by means of a registered lease deed for a period of five years. The tenant, at the end of the period, failed to restore possession and had also not paid the arrears of rent. Hence the suit. In his written statement, the defendant had stated that the settlement deed was executed in secrecy and that the prayer for declaration of title was unnecessary, irrelevant and not sustainable. The lower appellate Court decreed the suit in full. On further appeal by the defendant contending that there was no denial of title,

Held, A reading of the entire written statement clearly leads to the impression that the defendant did deny the title of the plaintiff. Having denied the title, merely expressing readiness and willingness to pay the arrears of rent would not mean that the denial of title would in any way be obviated or minimised. The second appeal was liable to be dismissed.

V. Shanmugam, for Appellant.

S.J. *Appeal dismissed.*

V. Ramaswami, J.

The Management of Perfect Castings Private Ltd. *v.* The Presiding Officer, Labour Court, Madurai.

23rd December, 1975.

W.P. No. 4049 of 1974.

Industrial Disputes Act (XIV of 1947), section 25-FFF, Constitution of India (1950), Article 226—Factory—Closure—Non-employment of workers—Subsequent lease of factory and change in management—Dispute referred to Labour Court—Management filing application on preliminary issue of jurisdiction—Arguments on preliminary issue—Labour Court disposing of both the dispute and application by common order—Whether correct.

On 23rd May, 1970, there was a closure of factory and the then Management offered compensation as provided under section 25-FFF of the Industrial Disputes Act. Thereafter, on 18th June, 1971, under a registered lease deed, the factory was leased for a period of one year. The lessee employed his own ment and ran the factory. At the end of the period, the lessee surrendered possession to the lessor. Thereafter five individuals acquired the interest of the then share-holders of the company and entered upon the management on and from 21st July, 1973. There was a dispute regarding non-employment of workers, and since conciliation failed, the Government referred to the Labour Court a dispute in I. D. No. 10 of 1974. The petitioners, the management, filed an application, I.A. No. 346 of 1974, raising a preliminary issue regarding jurisdiction on 18th July, 1974. Arguments were heard on 25th September, 1974 on the preliminary issue only, but the Labour Court pronounced a common order on 28th September, 1974 in I.D. No. 10 of 1974 and I.A. No. 346 of 1974 on the ground that both involved the question of non-employment of the workers. The management filed a writ petition on the ground that arguments were advanced only on the preliminary issue on 25th September, 1974 and they did not let in any evidence or argue the main dispute in I.D. No. 10 of 1974 and therefore, the Labour Court was in error in making an order in I.D. No. 10 of 1974.

Held, After taking up the preliminary objection separately, the Labour Court could not have made a common order without hearing the parties on the main dispute in I.D. No. 10 of 1974. The order of the Labour Court was, therefore, liable to be set aside (in so far as it related to I.D. No. 10 of 1974.)

M. R. Narayanaswami, for Petitioner.

S.J. ——— *Petition allowed.*

V. Ramaswami, J.

M. Nanjappan v. The Commissioner, Hindu Religious and Charitable Endowments, Madras.

24th December, 1975.

W.P. No. 4169 of 1974.

Hindu Religious and Charitable Endowments—Temple—Appointment of non hereditary trustees—Applications received from number of people—Report by Deputy Commissioner on six applications only—Appointment of five trustees by Commissioner without considering the other applications—Appointment not valid and set aside.

The competent authority for appointing the non-hereditary trustees for a temple is the Commissioner of the Hindu Religious and Charitable Endowments. In the instant case, there were a number of applicants for the appointment of five non-hereditary trustees of a temple. The Deputy Commissioner sent an interim report about six of the applicants and he had mentioned therein that there were also other applicants and a further report would follow. However, the Commissioner did not wait for the further report and appointed five out of the six applicants has whom report had been received. The petitioner who was an applicant has challenged the order of appointment of the Commissioner on the ground that his application had not been considered before the impugned order was made.

Held, it could not be denied that the Commissioner had to consider the applications of all those who had applied in time and he considered only six out of the total number of applicants and did not consider the other applications. The order of the Commissioner was liable to be set aside and was accordingly set aside.

R. Sundaralingam and *K. Jayaraman*, for Petitioner.

S.J. ——— *Petition allowed.*

N.S. Ramaswami, J.

The Prithvi Cap Industries, Sivakasi v. Prakash Harakchand Jain.

7th January, 1976.

C.M.A. No. 288 of 1974.

Civil Procedure Code (V of 1908), Order 41, rule 33—Suit for recovery of money—Three defendants—Decree against two defendants and dismissal against one defendant—Appeal by one of the defendants aggrieved—Decree set aside and matter remitted to trial Court for fresh disposal—The defendant against whom suit was dismissed questioning the remand—Remand held valid.

The plaintiff filed a suit for recovery of money against 3 defendants. The suit came to be dismissed as against the first defendant. The suit was decreed against defendants 2 and 3 alone. The second defendant filed an appeal and impleaded the plaintiff, 1st and 3rd defendants as respondents. The first appellate Court set aside the judgment and decree and remitted the matter to the trial court for a fresh disposal. A Civil Miscellaneous Appeal was filed by the first defendant who contended that the suit had been dismissed against him, that dismissal had become final and there was no scope for the first appellate Court to set aside even that part of the decree (dismissing the suit as against the first defendant) and remit the matter for fresh disposal.

Held, the very illustration to rule 33 of Order 41, of the Civil Procedure Code, would show that it was open to the first appellate Court even to grant a decree as against the first defendant in this case, even though the plaintiff had not filed an appeal against the dismissal of the suit as against the first defendant. That being so, it is certainly not right to contend that the first appellate Court had no power to set aside the decree as against the first defendant and remit the matter for fresh disposal even as against him.

T.R. Mani, for Appellant.

S. J. ——— *Appeal dismissed.*

Mohan, J.

The Management of M/s. P.Orr. & Sons (P.) Ltd. *v.* The Presiding Officer, Labour Court, Madras.

8th January, 1976.

W.P.Nos. 771 to 774 of 1972.

Industrial Dispute—Gratuity Scheme—'Wages'—Meaning of.

In a gratuity scheme, clause 1 related to death of employees. Clause 3 related to termination of services of employees by the management for some reason or other. Those two cases had been treated separately by the Industrial Tribunal in that gratuity was to be computed with reference to *basic wages*, since clause 2 would relate to cases of retirement by the employees owing to sickness or old age. In the case of clause 2, the claim was computed construing the word 'wages' as including the dearness allowance. Against this the management filed the writ petitions contending that the word 'wages' relating to employees falling under clause 2 cannot be given a different meaning from that used in respect of employees falling under clause 1 and 3.

Held, It could be legitimately presumed that the Industrial Tribunal while passing the award was not prepared to equate them with persons who voluntarily retired from service either on account of age or on account of sickness. There was no error in the interpretation.

M.R. Narayanaswami, for Petitioner.

S.J. ——— *Petitions dismissed.*

V. Ramaswami, J.

K. R. Mahalingam *v.* State of Tamil Nadu.

23rd January, 1976.

W.P. No. 4269 of 1974.

Tamil Nadu State and Subordinate Rules, General Rules, Rule 10 (a) (1)*—Veterinary Assistant Surgeon—Appointed temporarily as Assistant Director of Animal Husbandry—Off and on appointment as such—Report of the Public Service Commission that the petitioner was "not yet fit" for appointment as Assistant Director—Petitioner reverted as Veterinary Assistant Surgeon—Reversion whether punishment—Validity—Constitution of India* (1950), *Article* 311 (2).

The petitioner was appointed as a Veterinary Assistant Surgeon. Subsequently he was appointed temporarily as Assistant Director of Animal Husbandry off and on. At the instance of the Government, the Director of Animal Husbandry requested that Tamil Nadu Public Service Commission for selection of candidates for regular appointments by transfer to the cadre of Assistant Director of Animal Husbandry and sent a list of names of Assistant Surgeons with his remarks. The Commission returned a list of names in order of merit for appointment but did not include the petitioners' name and reported that he was "not yet fit" for appointment as Assistant Director. The Government accepted the report and ordered the reversion of the petitioner to the post of Assistant Surgeon. The petitioner challenged this order and contended that it violated Article 311 (2) of the Constitution, that he was reverted only by way of punishment without framing charges and giving him an opportunity.

Held, that by using the expression 'not yet fit', the Government did not intend to visit the petitioner with any further consequences or cast aspersions against the character and integrity of the petitioner. In these circumstances, the order of the Government was not liable to be interfered with.

N. Srivatsamani and *P. Guru Ramachandran,* for Petitioner.

S.J. ——— *Petition dismissed.*

AGE IN COURTS

By

R. THILLAI VILLALAN,

Madras Corporation Legal Adviser.

'Age in Courts' is a very wide subject. I shall discuss it to a limited extent.

The recent case of Valampuri John is an instance of "Age in election case".

If there are genuine reasons, it is not wrong or strange to change the date of birth subsequently. There are rules and provisions in different codes and statutes. There are decided cases. Generally, in these cases the contention will be that the age is higher in records than the actual due to wrong entry, but in Valampuri John's case it was peculiarly contended that the age was reduced since wrong date of birth had been given.

Some excerpts of the judgment in *Mohanarangam* v. *Returning Officer, Legislative Assembly Department, Madras and 9 others*[1], are extracted hereunder:

"Before I deal with the various issues, the well known principles in deciding election matters may be set out and I do not think, there is any necessity to refer to the authorities in support of the same. An election petition is not an action at law or a suit in equity, but is purely a statutory proceeding in which the requirement of election law has to be observed. It is a sound principle of justice that the success of a candidate, who has won at election, should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of law. But at the same time, it has to be remembered that the policy of election law is to maintain the purity of elections and hence all the allegations and malpractices including corrupt practices at the time of elections should be thoroughly investigated".

"The question relating to age is one of the subject facts and it can be easily decided in this case that the date of birth of the respondent is 14th May, 1946 or at any rate, the year of birth is 1946 and there are very many admissions by the respondent himself ....".

"Nor again, am I impressed with the argument that merely because section 49 (b) of the State and Subordinate Service Rules or rule 145 of the Railway Employment Code Vol. 1, provide for alteration of the date of birth, in every case, it must be presumed that a wrong age has been given. Each will depend upon the facts and circumstances which are peculiar to itself.".

"Many of the above documents contain signed declarations by the respondent and they will constitute admissions and they are substantial evidence in view of sections 17 and 21 of the Evidence Act, though they may not be conclusive and the various decisions relied on by the petitioner fully support him........As rightly submitted on behalf of the petitioner the admission is the best evidence the opposite party can rely upon.... In respect of this submission the decision in *Chandra Kunwar* v. *Chaudhri Narpet Singh*[1-a] is cited before me. In that case the Privy Council has held at page 194:

"The proof of the admission shifts the burden because, as against the party making it, as Baron Parke says in *SLATTERIE v. POOL* 'what a party himself admits to be true may reasonably

1. Election Petition Nos. 1 and 2 of 1974.

1-a. (1907) I.L.R. 29 All. 184.

be presumed to be so'. Another case cited in this behalf is *Narayan Bhagwant R. Gosavi Balajiwale* v. *Gopal Vinayaka Gosavi and others*[2]. At page 784 the Supreme Court have held :

"An admission is the best evidence that an opposing party can rely on and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous."

Lastly the decision in *Bharat Singh and others* v. *Mst. Bhagirathi*[3], is relied on:

"Admissions are substantial evidence by themselves in view of sections 17 and 21 of the Evidence Act, though they are not conclusive proof of the matters admitted." These admissions can undoubtedly be used as against the respondent, and in case of absence of any evidence to the contrary, which is so in the present case, their evidentiary value is of a higher order. All that is said is the mistake in the entry in the School Register regarding the date of birth has been carried forward from one record to another and any document which contains an entry relating to his date of birth other than 14th May, 1943 is incorrect. A similar thing happened in *N. Sankara Reddy* v. *Yashoda Reddy*[4] also. In his submission, the case on hand should be viewed in the background of the decision reported in *Brij Mohan Singh* v. *Priya Brat Narain Sinha and others*[5], where also a wrong entry made in the admission register was carried over to the Matriculation Certificate and the same was adhered to in the later records. I may at once point out that there is absolutely no foundation for this submission since there is no pleading at all to the effect that the original entry in the School Register was a wrong entry and a lower age was given or the academic age was purposefully minimised by the parent or guardian in order to gain some advantage for the student, namely, the respondent. In *N. Sankara Reddy* v. *Yashoda Reddi*[6], no doubt the birth register was produced which was accepted. In the later part of my judgment, I will show as to how evidence is lacking to hold against this admission, and in my view *N. Sankara Reddi* v. *Yashoda Reddi's case*[6] has no application. It is obvious that there is not even a suggestion that the entry was wrong. No explanation has been offered as to how and why such an incorrect entry has been given. Was it by mistake, inadvertence or deliberate or designed ? One is obliged to guess. "It is no function of a Judge to be lachrymose over what might have been brought out in evidence. His function is to go by evidence that exists", in the words of Bijayash Mukerji, *J.* (vide *Babulal Choukhani* v. *Caltex (India) Limited*[7]. In the Supreme Court the case relied upon, namely *Brij Mohan Singh* v. *Priya Brat Narain Sinha and others*[8] the case of the appellant, as seen from paragraph 20, at page 287, is that the date of birth *viz.*, 15th October, 1937 was an incorrect statement made at the request of the person who went to get admitted to the school. The request was made to make him appear two years younger than he really was, so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. This was accepted by the Election Tribunal which was rejected by the High

2. 1960 S.C.J. 263 : (1960) 1 S.C.R. 773 : A.I.R. 1960 S.C. 100.
3. (1966) 2 S.C.J. 53 : (1966) 1 S.C.R. 606 : A.I.R. 1966 S.C. 405 at 410.
4. (1956-57) 13 E.L.R. 34.
5. (1964) 1 S.C.J. 644 : (1964) 2 M.L.J. (S.C.) 140 : (1964) 2 An.W.R. (S.C.) 140 : A.I.R. 1965 S.C. 282.
6. (1956-57) 13 E.L.R. 34.
7. A.I.R. 1967 Cal. 205.
8. (1964) 1 S.C.J. 644 : A.I.R. 1965 S.C. 282.

Court as untrustworthy. Under those circumstances, the Supreme Court held :

" However much one may condemn such an act of making a false statement of age with a view to secure an advantage in getting into public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. We find it impossible to say that the Election Tribunal was wrong in accepting the appellant's explanation. Taking all the circumstances into consideration, we are of the opinion of that the explanation might very well be true ".

I may now usefully refer to the decision reported in *Manohar Naicker* v. *Binode Behari Barina*[9] wherein :

"The first respondent's election was challenged on the ground, *inter alia* that his age was less than 25 years, at the time of election. The Tribunal, relying on the horoscope evidence as against the date of birth recorded in the School Certificate, held that the respondent was more than 25 years of age on the date of his election.

In appeal, it was held that there was no evidence on behalf of the respondent to negative the accuracy of the school age as representing the real age. The respondent had merely averred that the matriculation certificate could not be taken as conclusive proof of the fact in issue. Apart from the other evidence showing the genuinenss of the entry of the age in the school certificate the publication of the matriculation result with the age and and description of the candidate is a fact of a public nature. The Court has to form an opinion as to the existence of this fact and the recital of age contained in the *Orissa Gazette* is a relevant fact. The gazette itself is presumed to be genuine under section 81 of the Evidence Act."

9. (1961-62) 23 E.L.R. 379.

I may also take note of a similar contention advanced in this case, which was dealt with at page 386 of in paragraph 15. "On the basis of *Janaki Nath Roy* v. *Jyotish Chandra*[10], *Miss Shrien Mall* v. *John James Taylor*[11] and 3 Elec.L.R. 31, Mr. Patnaick contends that the date of birth as entered in the school register of Kuchinda and as found in Exhibit 14, though admissible is not of great evidentiary value as there is no evidence to show as to on what materials this entry in the admission register about the age of the respondent No. 1 was made. Even on such a proposition, appellant will succeed if there is no evidence to the contrary on behalf of the respondent........In *Hrishikesh* v. *Sushil Chandra*[12], *V. M. Nampoothiri* v. *K. K. Kuruvilla*[13], *Aga Jan Khan Rahim Khan* v. *Kesho Rao Nathuran Maratha*[14] it has been held that Matriculation certificate and school admission register are admissible as proof of the age of the person concerned. In *Nampoothiri* v. *Kuruvilla*[13], observation has gone to the extent that the entry thus made in official record by a public servant in discharge of his official duty has to be presumed as correct in the absence of other reliable evidence to the contrary".

These observations in my view, apply with full force to the facts of the present case. Under those circumstances, I have no hesitation to hold that the allegation that because of the influence exercised by the respondent, this register has not been forthcoming, must be rejected. However, the Birth Register for the year, 1943 has been produced. Relying on the decisions in *Queen Empress* v. *Grees Chunder Banerjee*[15], and *Ali Nasir*

10. A.I.R. 1941 Cal 41.
11. A.I.R. 1952 Punj. 277.
12. A.I.R. 1957 Cal. 211.
13. A.I.R. 1957 Ker. 103.
14. A.I.R. 1940 Nag. 217.
15. I.L.R. (1884) 10 Cal. 1024.

Khan v. *Manik Chand and another*[16]. Mr. Venugopal states that there is no entry relating to the birth of the respondent in the year 1943, and therefore, this register will be inadmissible in evidence, since the register cannot be accepted in evidence to prove the absence of an entry, while an entry in the Register alone could be relied upon. This contention is not correct. Because the respondent set up the year of birth as 1943 to rebut that statement, the register for the year 1943 relating to the respondent's village has been summoned, lest, as rightly contended by Mr. Parthasarathy, learned counsel for the election petitioner in Election Petition No. 2 of 1974, the absence of that register would have given rise to possible comments by the respondent concerning the failure to summon the same. In my view, the petitioner did the right thing in summoning this register which has dispelled every doubt. Therefore, neither of the rulings relied on by the respondent can be of any assistance to him.

I summarise my conclusions as follows:

(1) A large volume of public records clearly show the date of birth as 14th October, 1946. Whatever the discrepancy may be, one thing is certain, that is, the respondent was born in the year 1946.

(2) There are valuable admissions made by the respondent under the signed declarations, a list of which I have set out above, which cannot be got over by a simple explanation that the wrong date has been carried forward from one record to another for which as shown earlier, there is no basis at all, much less any evidence. The petitioner has taken all possible steps (vide Exhibits P-48, P-49, P-52 to P-57 and P-60 to P-63) to produce the best evidence possible, as a result of which alone all these documentary evidence, have come to Court. In fact, I should say that no effort has been wanting from the petitioner in this regard, and therefore it is futile to contend that the burden of proof has not been discharged. I may, in the connection, usefully refer to the observations of the Supreme Court in *Narayan Bagwantrao Gosavi, Balaji Wale* v. *Gopal Vinayak Gosavi and others*[14]

"The burden of proof is of importance only where, by reason of not discharging the burden, which was put upon it, a party must eventually fail. Where, however, the parties have joined issue and have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided the abstract question of burden of proof becomes academic".

(3) The documentary and oral evidence on the side of the respondent are liable to be rejected.

From the above, the irresistible conclusion is that the respondent was born in the year 1946, which would mean that he had not completed 30 years of age on the date of the scrutiny of nominations, as required under Article 84 (*b*) of the Constitution. Not to hold so, would amount to shutting one's eyes to reality plain to be seen and accepting a mythical baptism in the year, 1943.

The framers of the constitution fixed the age for election to the Rajya Sabha at 30. So that men of mature wisdom and rich experience might be the Members and that is why they are called "the elders". This Court must be jealous of persons trying to circumvent the salutary principle and any usurpation of this high office must be prevented and

16. (1903) I.L.R. 25 All. 90.

17. 1960 S.C.J. 263 : (1960) 1 S.C.R. 773 at 782 : A.I.R. 1960 S.C. 100.

the purity of elections must be maintained, since on that alone real democracy can flourish.

The returning Officer as he is well known, can only look into the electoral roll and he cannot go behind it. When the respondent produced Exhibit R. 2, the certified extract, the Returning Officer has no option other than to accept the nomination on the strength of the electoral roll. Under section 36 (2) of the Representation of the People Act, 1951, the Returning Officer has got to examine the nomination paper and decide all objections that may be made to any nomination. In so far as no objection had been raised, he would have had no opportunity to go into this question. Nor can he *suo motu* embark upon an enquiry, since he would have had no reason to conclude that the respondent was underaged with the corrected electoral roll before him. In fact, in similar circumstances, the Supreme Court has held in *Durga Shankar Mehta* v. *Thakur Raghuraj Singh and others*[18], when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer, has no other alternative but to accept the nomination. This would be apparent from section 36 (7) of the Act. In other words, the electoral roll is conclusive as to the qualification of the electorate except where a disqualification is expressly alleged or proved. In view of this, it cannot be held that the respondent is guilty of any corrupt practice. Even if the respondent has given a false declaration, that is a matter which arises under the Representation of the People Act of 1950 and section 31 specifically deals with the same. Sitting as an Election Tribunal all that I can enquire into is whether there has been any non-observance of the provisions of *this Act* or of any Rule or orders made under this Act, as laid down in section 100 (1) (*d*) (*iv*) of the Representation of the People Act, 1951.

The preamble of the Act itself reads as follows:—

"An Act to provide for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections".

Apart from the preamble referring to the Houses of Parliament, there are also other sections from which it can be easily gathered that the election to the Rajya Sabha cannot be excluded, *viz.* sections 2 (*d*), 3, 7 (*b*), 12, 29, 39, 67, 67 (*a*), 68, 69, 70, 71, 79 (*b*) and (*f*), 147 and 155. In addition to these, the Conduct of Elections Rules, 1961 also contain a few Rules which are relevant and they are rules 2 (1) (*c*), 67, 70, 71 and 85. In fact, Article 329 (*b*) of the Constitution bars any other remedy excepting an election petition concerning an election to either House of the Parliament. Thus, I hold that section 101 applies to an election to the Council of State.

There is a specific provision for changing a date of birth by the Government employee after entering into service in the Service Rules.

Similarly there is a provision in the Railway Code also for this purpose. There are decisions that civil suits and declaration suits can be filed under

18. (1954) 2 M.L.J. 383 : 1954 S.C.J. 723 : (1955) 1 S.C.R. 267 : A.I.R. 1954 S.C. 520.

section 42 of Specific Relief Act. There are decisions contrary to this view also.

Some important and interesting decisions in this regard are given.

In the year 1955, in *The Director of Public Instruction* v. *Mohandas*,[19] before Chief Justice Rajamannar and Justice Rajagopala Iyengar a definite answer was given to a question how and when the date of birth entered in the S.S.L.C., Certificate can be changed.

"The allegations made by the respondent in the affidavit filed by him in support of his application were that he passed his S.S.L.C. Examination in March, 1948 and subsequently became a graduate of the Madras University, that he recently noticed that his date of birth had been wrongly entered in his S.S.L.C. Book as 8th March, 1930, that this was due to a pure slip and mistake, that he was filing a certified copy of his date of birth and that the tahsildar had made the necessary correction in his records. He stated that in reply to a communication to the Director of Public Instruction to make the correction he received a reply directing him to secure an order to that effect from a competent civil Court. On behalf of the Director of Public Instruction, the Superintendent in the office filed a counter-affidavit in which the allegation that the correct date of birth of the applicant was 26th October, 1931 was not admitted and objection was taken to the maintainability of the application. The objection set out is thus:—

"3. The applicant had his eligibility declared in March, 1948 and it was in connection with that and for that purpose only the Director of Public Instruction was concerned with the applicant's age. After his eligibility was declared the Director of Public Instruction has nothing to do with the applicant's age. In the circumstances, the respondent has neither the duty nor the right to enquire into or alter the applicant's date of birth. And so, it is submitted that the respondent cannot be called upon under section 45 of the Specific Relief Act, to do an act, which is neither by law incumbent on the Director of Public Instruction nor with which he is in any way concerned as such officer. The application is misconceived and is not maintainable".

The learned Judge, Panchapakesa Ayyar, J., overruled the objection, and after taking evidence, held that the correct date of birth of the respondent was 26th October, 1931 and ordered the Director of Public Instruction to alter his date of birth to 26th October, 1931. The Director of Public Instruction is the appellant before us, and on his behalf the learned Advocate-General has pressed before us the objection that the application of the respondent is not maintainable under section 45 of the Specific Relief Act.

Before the applicant is entitled to an order under section 45 of the Specific Relief Act, he should establish that all the requirements contained in clauses (*a*) to (*h*) of that section are satisfied. One of such requirements in that the doing of the specific act required to be done is "Under any law for the time being in force clearly incumbent on such person ....in his........public character". We asked learned counsel for the respondent under what law in force was it clearly incumbent on the Director of Public Instruction to carry out the correction. Learned counsel could only refer to a rule framed by the S.S.L.C. Board, apparently with the approval of the Government. The material parts

19. A.I.R. 1955 Mad. 639.

of Subsidiary Rule 5, which is the only relevant rule, is as follows:

"When the Secondary School Leaving Certificate is opened on behalf of the pupil, care should be taken to ascertain the correct date of birth and enter that date in the Secondary School Leaving Certificate and it does not differ from the date entered already in the admission register of the school, no evidence need be demanded from the parent or guardian of the pupil, but a declaration to the effect that the date of birth entered on the school register is the correct date of birth of the pupil and that no alteration of that date will be demanded in future on the plea that the correct date was not given at the time of admission should be invariably taken from the parent or guardian and filed in the school."

In all cases, where the date proposed to be entered in the Secondary School Leaving Certificate differs from the one already entered in the school admission register, the parent or guardian should be required to produce either a certified birth extract from the Register of Births and Deaths maintained on public authority or a baptism certificate (in the case of Christian pupils only) for the correct date. A declaration to the effect that the certificate produced relates to the pupil in question and to none else should be taken. In cases where birth extracts cannot be produced for valid reasons a declaration made before the head of the school or any evidence that he or she may regard as satisfactory may be accepted.

The approval of the Inspecting Officer should be taken by heads of institutions only in cases where the date of birth of the pupil at the time of the opening of the Secondary School Leaving Certificate differs from the date originally entered in the Admission Register maintained in the school. These statements should be filed in the school for future reference. If this is done, there will be no need for making any alteration therein later. In any event, alterations in the date of birth of pupils will not ordinarily be sanctioned "after they reach Form V. Subject to these conditions, inspecting officers may sanction alterations in the date of birth but must do so only after satisfying themselves by requiring the production of clearest evidence that the date as already entered in the certificate is incorrect and that the one proposed to be inserted is correct. Applications for alterations in the date of birth will not be entertained after a pupil has completed his school course and appeared for the S.S.L.C. Public Examination."

The learned Advocate-General has brought to our notice two Government Orders bearing on this point, one is G.O. Ms. No. 954, Education, dated 23rd June, 1941. It runs as follows: —

"The Government are not in favour of a modification of the general rule that alterations in the entries relating to the date of birth or other particulars in the Secondary School Leaving Certificate of a pupil should not be made after the pupil has completed his school course and left the school. They have, however, no objection to the correction of obviously absured mistakes in the certificates after the pupil has left the school. Such corrections should be made only under the orders of the Director of Public Instruction and should be attested by an Officer of the Educational Department not lower in rank than a District Educational Officer or Inspectress of Schools.

The other order is G.O. Ms. No. 39, Education, dated 12th January, 1944. It runs as follows:

" In the subsidiary rules framed by the Secondary School Leaving Certificate

Board, Madras, there has long been a provision that alterations in the entries relating to the date of birth in the Secondary School Leaving Certificate of a pupil should not be made after the pupil has completed the school course and left the school. Recently the Secondary School Leaving Certificate Board has slightly modified this provision and the rule now is to the effect that alterations in the entries relating to the date of birth should not be made after the pupil has completed his school course and appeared for the Secondary School Certificate Public Examination. While the Government do not propose to interfere with the general arrangement, they consider it necessary to provide for certain special cases and therefore authorise the Director of Public Instruction to correct the date of birth in the Secondary School-Leaving Certificates is in the following circumstances:

1. When an obviously absurd entry has to be set right; and 2. When a civil Court directs correction in any individual case.

The corrections should be made only under the Director's orders and should be attested by an Officer of the Education Department not lower in rank than a District Educational Officer or Inspectress of Schools."

The applicant in this case, the respondent before us, finished his school course in March, 1948, and the present application was made in April, 1954. If reliance is placed on Subsidiary Rule 5 that very Rule expressly provides that applications for alterations in the date of birth will not be entertained after a pupil has completed his school course and appeared for the S.S.L.C. Public Examination. If the applicant wants, however, to rely on the subsequent Government Orders, then he should make out that there has been an obviously absurd mistake in the entry which should be corrected. So the only course open to the Director of Public Instruction in an application for alteration of the entry relating to the date of birth, if it is made long after the applicant has appeared for the S.S.L.C. Public Examination is to decide whether there has been an obviously absurd entry which needs correction. He has no power to direct the applicant to obtain from the civil Court an order directing the correction. In any event, it is quite clear, and both the learned Advocate-General and counsel for the respondent agree, that on an application under section 45 of the Specific Relief Act, all that the applicant will be entitled to is a direction to the Director of Public Instruction to deal with the application himself. In no case can, on such an application, this Court go into the merits of the application and itself determine the correct date of birth of the applicant.

It follows the order of the learned Judge ordering the Director of Public Instruction to alter the date to 26th October, 1951, is obviously wrong and must be set aside. The question is whether the Director of Public Instruction should be called upon to deal with the application and decide whether there has been an obviously absurd mistake. Though technically this should be the proper course, we do not think it necessary to follow that course in this case. It is only if there is an 'obviously absurd entry' that the Director of Public Instruction can make an alteration. It is not every mistake in the entry that can be called an 'obviously absurd mistake' though this was the argument in effect of the learned counsel for the respondent. Though it is difficult to lay down a definite test to find out whether the mistake is or is not obviously absurd, we give as an instance of an obviously absurd mistake a case where according to the date of birth as entered in S.S.L.C.

Register the pupil would have been admitted to the IV form when he was two or three years old. As an instance of a mistake which is not obviously absurd, we can give a case where a pupil's date of birth is given as 26th October, 1951, when it should have been 26th August, 1951. In the present case, the mistake alleged clearly does not fall within the category of obviously absurd mistakes. It was not therefore incumbent on the Director of Public Instruction to make the alteration prayed for by the applicant. In these circumstances, we hold that the application under section 45 of the Specific Relief Act made by the respondent was not maintainable.

The Government Order dated 12th January, 1944, mentions another contingency which would authorise the Director of Public Instruction to order a correction at any time in the date of birth *i.e.*, when a civil Court directs correction in any individual case. What exactly was contemplated by the Government in making this provision is not clear. Whether in an appropriately framed suit a civil Court could decide or not what is the correct date of birth of an individual, it is not necessary to discuss in this case. But we have no doubt whatever that on an application under section 45 of the Specific Relief Act this Court has no power to direct a correction in any individual case by giving a finding as to the correct date of birth. The Government Order itself cannot empower this Court or any other Court to make an enquiry as to the correct date of birth of any individual and to direct a correction as a result of such enquiry. The power and jurisdiction of a civil Court to do so must depend on the general law and cannot be founded on the above provision in the Government Order.

Our attention was drawn to a judgment of Bell, J., in a similar case in *Ramamurthy v. Director of Public Instructions, Madras*[20]. In that case, the applicant had appeared for and passed the S.S.L.C. Public Examination in March, 1942. But according to the date of birth on his certificate, he was under age, and under the Regulations he was not declared eligible to join the University. It was then that he made the application for correction of the date of birth. The Director of Public Instruction refused to make the alteration on the ground that no alteration could be made after the pupil had completed the Secondary School Leaving Certificate course and left the school. Actually, when the application was made the pupil was still at school, and he had not terminated his connection with the school until later. He thereupon filed an application under section 45 of the Specific Relief Act for an order that the Director shall make the alteration. The learned Judge found that on the date when the application was made to the Director of Public Instruction he had not left the school. On that finding, the case clearly fell within subsidiary rule 5 and the Director was bound to have dealt with the application on merits. Therefore, the learned Judge very properly directed the Director of Public Instruction to consider and determine the application for alteration in accordance with the spirit of the Rules and the subsequent Government Order of 1941. We are in the entire agreement with the actual decision in this case on the facts found there. Bell, J., however made certain observations in the language of the Government Order, dated 23rd June, 1941. He said:—

What the words 'obviously absurd' mean I cannot tell. The meaning would differ according to the taste of the individual reading it. To my mind to have

20. (1943) 2 M.L.J. 665 : 212 I.C. 394; A.I.R. 1944 Mad. 187.

on a school certificate a date which does not correspond with the certificate of the Register of Births, is not only absurd but is one which should not be permitted to remain by any public authority. If the Register of Births is maintained under public authority, then it is proper that all Government documents should bear the date as shown in those registers and that information given to them by muddled or ignorant parents should not be finally and irrevocably relied upon... In my opinion the Government gives the widest discretion to the Director of Public Instruction that wherever a case of a clerical error or a *bona fide* mistake or manifest injustice is brought to his notice, despite all the general rules, he may make the alteration.

With respect to the learned Judge, we do not agree with him, that merely because the date in the school certificate does not correspond with the certificate of the Registrar of Births there is an obviously absurd mistake. It would depend upon each case. We also do not agree with him that it is incumbent on the Director of Public Instruction to make an alteration wherever a case of clerical error or a *bona fide* mistake or manifest injustice is brought to his notice at a time long after the applicant has finished his school course, despite the rules.

In the year 1965, in *Divisional Inspector of Schools, Coimbatore* v. *K. V. Ramachandran and others*[21] all aspects of this question of age has been dealt with. The important portions are reproduced hereunder.

The 1st respondent, who is the headmaster of a District Board High School, Kottur-Malayandipatnam, filed the suit O.S. No. 542 of 1961 on the file of the District Munsif of Coimbatore (out of which this present second appeal arises) for a declaration that his correct date of birth is 27th November, 1908 for a mandatory injunction against the District Collector and the Special Officer, District Board, Coimbatore not to retire or compel retirement of the plaintiff on the basis that his date of birth is 13th May, 1907. The plaintiff also asked for such other reliefs as might be just and proper in the circumstances of the case. The trial Court dismissed the plaintiff's suit holding that the plaintiff had not made out that his correct date of birth is 27th November, 1908. But on appeal the learned Subordinate Judge upheld his claim and decreed the suit as prayed for. The present second appeal has been preferred by the Divisional Inspector of Schools, Coimbatore, the 4th respondent in the lower appellate Court.

The service register of the plaintiff shows that after completing his training course, the plaintiff served in several institutions from 1936 onwards and that it was only in 1941 when he was serving in Board Middle School, Sulur, that his date of birth came to be recorded in his service register marked as Exhibit A-4. On the same day when in his service register his date of birth was recorded as 13th May, 1907 which date was adopted from the entry in the Secondary School Leaving Certificate of the plaintiff, the plaintiff filed a memo. before the Headmaster which has been marked as Exhibit A-5. He has stated therein that his correct date of birth is 27th November, 1908 that he applied to the District Educational Officer, Coimbatore requesting that his date of birth might be entered in the service register as 27th November, 1908, that his request was refused by the President, District Board, that the plaintiff was intending to apply to the Government to permit the alteration of the date of birth from 13th May, 1907 to 27th November, 1908 and that till such application is disposed of, his date of birth may

21. S. A. No. 309 of 1965 dated, 14th November, 1966.

be entered as 13th May, 1907 in the service register. I am referring to this document Exhibit A-5 at the threshold to indicate that that the plaintiff has not accepted in any unequivocal manner his date of birth *i.e.*, 13th July, 1907 as entered in the service register, that it was only tentative and that it might have to be altered as 27th November, 1908 after the plaintiff obtains appropriate orders from the Government. In April, 1951, the plaintiff approached the Director of Public Instruction, Madras, for the alteration of his date of birth and by an order dated 6th October, 1951 (Exhibit A-6) the Director of Public Instruction refused that request on the ground that the alteration of the date of birth in the service register could not be permitted at that stage. The District Board merely communicated to the plaintiff this decision of the Director of Public Instruction. In March, 1960 (Exhibit A-7) the Plaintiff renewed that request by writing to the Special Officer, Coimbatore District Board, setting out all the facts and requesting the alteration of his date of birth as 27th November, 1908. The plaintiff appears to have received a letter from the Government dated 25th June, 1960 asking for further particulars and the plaintiff sent Exhibit A-8, dated 27th June, 1960 furnishing the particulars required. Ultimately the plaintiff received a communication (Exhibit A-9) dated 5th October, 1960 from the Special Officer, District Board, Coimbatore, which enclosed a copy of the order passed by the Director of Public Instruction dated 14th September, 1960 (Exhibit A-10) and also a copy of the G.O.Ms. No. 983, Education, dated 5th April, 1949. The order of the Director of Public Instruction is very brief and the purpose of enclosing the G.O.Ms. No. 983, Education, dated 5th April, 1949 referred to is to emphasise that neither the Director of Public Instruction nor the Government can conduct an investigation and order correction and that the appropriate remedy for the plaintiff would be to seek such a declaration from a civil Court. Some correspondence ensued between the parties but as there was no response to the plaintiff's request, the plaintiff was obliged to file the present suit for establishing that his correct date of birth is 27th November, 1908.

In support of his case, the plaintiff relied upon (Exhibit A-1) an extract from the Register of Births in Tiruchinopoly Municipality relating to the birth of the plaintiff. He also relied upon his evidence as P.W. 1 as well as the evidence of his mother aged about 80 years which was recorded on commission. The learned District Munsif was not inclined to accept the oral evidence of the plaintiff's mother P.W. 2 nor was he prepared to act upon the evidence afforded by the birth register extract Exhibit A-1. The trial Court was of the view that there were certain discrepancies in Exhibit A-1 for instance, the informant is mentioned as T. S. Sethurama Iyer while the maternal uncle of the plaintiff who is claimed to have given the information about the birth of the plaintiff was one T. S. Sitharama Iyer, the brother of P.W. 2. The other discrepancy in Exhibit A-1 which weighed with the trial Court was that the plaintiff's father was described as surveyor while he was a Revenue Inspector. The trial Court also took the view that there were some discrepancies in the oral evidence of P.W. 2. The trial Court was of the opinion that the plaintiff was not entitled to relief on the ground that he was guilty of inaction and gross negligence in not having secured the correction of his date of birth at the earliest moment.

The lower appellate Court rightly took the view that the birth register extract Exhibit A-1 and the oral evidence of

P.W. 1 as well as his mother P.W. 2 clearly established that the correct date of birth of the plaintiff was 27th November, 1908. The lower appellate Court has discussed this matter in paragraphs 10 to 18 of its judgment. In assessing the oral evidence of P.W. 2, it has to be borne in mind that at the time when she gave evidence she was very old, aged 80 years, and necessarily allowance had to be made for some inaccuracies or want of precision or her inability to furnish details with reference to some of the events in the family of the plaintiff, like marriage of some of the members of the family. If the oral evidence of P.W. 2 is as perfect and complete as was expected by the learned District Munsif, it will cause suspicion as being completely tutored evidence. Taking the evidence as a whole, the lower appellate Court was satisfied that the evidence given by P.W. 2 was true. I am satisfied that the evidence given by P.W. 2 was true. The assessment of this evidence by the lower appellate Court is correct and no ground has been made out for interference in the second appeal.

So far as Exhibit A-1, the birth register extract is concerned, it was obtained in 1929 long before disputes arose. The father's name of the plaintiff is given correctly. The plaintiff was born in Tiruchinopoly and there is no rebutting evidence on the side of the defendants that the plaintiff was born elsewhere; nor is there any rebutting evidence on behalf of the defendants to show that the entry is referable to any other child of the parents of the plaintiff. P.W. 2 the mother has stated that four children were born to her, the other two daughters and later on two sons, one Narayanasami and the other the plaintiff. The discrepancy about the name of the informant, whether it is Sethurama Iyer or Sitharama Iyer, has been satisfactorily explained. In this connection, it has to be noted that even in 1950 the plaintiff made an attempt to get another copy of this birth register extract but he could not get one as the entries in that register were found soiled and damaged (vide Exhibit A-14 dated 2nd November, 1950, reply received by the plaintiff).

There is also the important fact that even at the inception when the date of birth came to be entered in the service register, the plaintiff mentioned this date *i.e.*, 27th November, 1908. I have myself perused the oral evidence of P.W. 2 and I am satisfied that her version is true and has been rightly accepted by the lower appellate Court. Having regard to all these circumstances and in particular the total absence of any rebutting evidence to connect the entries in Exhibit A-1 to any other child of Mr. Venkatrama Ayyar, the deceased father of the plaintiff, I have no hesitation in accepting the findings of fact arrived at by the lower appellate Court.

On the finding that the correct date of birth is 27th November, 1908 three questions arise for determination: (1) whether the present suit by the plaintiff is barred by any rule of limitation, (2) whether the suit is barred under section 42 of the Specific Relief Act or any other provision of law, and (3) what is the relief to which the plaintiff is entitled.

On the question of limitation, it has to be mentioned that there was no plea and no issue was raised in the trial Court. The learned District Munsif has not given any finding on that question. As observed earlier, he only took the view that the plaintiff had disentitled himself from getting this relief on the ground of gross negligence.

But the point was raised in the lower appellate Court that the suit was barred

under Article 96 or Article 120 of the Limitation Act. Learned counsel Mr. Thiyagarajan, appearing for the 1st respondent (headmaster) contended that Article 96 would have no application to the instant case and that so far Article 120 was concerned, the cause of action had not accrued so as to start the running of time under column 3 of Article 120. He argued that within a period of six years prior to suit the right asserted by the plaintiff in the suit had not been unequivocally repudiated nor denied by the party bound to concede the plaintiff's claim. Mr. Thiyagarajan contended that in the 1st place the order of the Director of Public Instruction was not an unequivocal repudiation and secondly in any event as laid down in *Director of Public Instruction* v. *Mohandas*[22], the Director of Public Instruction was not the authority bound to agree to the alteration of the date of birth and that the Director of Public Instruction was not interested in either agreeing to the alteration or refusing to alter the date of birth.

Article 96 provides for a suit for relief on the ground of mistake, and the period of limitation of three years is reckoned from the date when the mistake becomes known to the plaintiff. On the above narration of facts, it will be seen that Article 96 has no application to the instant case. Even when the date of birth was entered in the service register as 13th May, 1907 being entered as his date of birth in the service register only tentatively, " reserving his right to establish on a future occasion that the correct date of birth is 27th November, 1908, there was nothing agreed to between the parties regarding the date of birth at that time. And so there is no question of any mistake being corrected. The position at the time when the entry regarding the date of birth was made in the service register was that it was liable to be re-fixed after the authorities concerned were satisfied that the correct date of birth was 27th November, 1908. It is not a case of rectification of a document or a contract. Article 96 of the Limitation Act has therefore no application to the instant case.

So far as Article 120 of the Limitation Act is concerned the plaintiff will be entitled to institute a suit within six years when the right to sue which is asserted in the suit has accrued to him. The question is whether the entry in the service register in 1941 or the communication of the Director of Public Instruction in Exhibit A-6 in October, 1951 would amount to an accrual of a cause of action so as to start the running of time against the plaintiff. In considering the effect and significance of the unsuccessful attempt of the plaintiff in 1941 or 1951 to have his correct date of birth entered, it should be borne in mind that during that time the law was uncertain as to the procedure and the machinery by which any employee of an educational institution could get a correction or alteration of his date of birth as entered either in the Secondary School Leaving Certificate or in the service register. It is only in 1955 as a result of the Bench decision in the *Director of Public Instruction* v. *Mohandas*[23] of Rajamannar, C.J. and Rajagopala Iyengar, J., that the position became clarified. Up till then, the proceedings were initiated against the Director of Public Instruction for directing him to make the necessary corrections in the Secondary School Leaving Certificate Book, under section 45 of the Specific Relief Act. The Bench has taken the

---

22. (1955) 1 M.L.J. 488 : 68 L.W. 368: A.I.R. 1955 Mad. 639.

23. (1955) 1 M.L.J. 448: A.I.R. 1955 Mad. 639.

view that there is no duty cast upon the Director of Public Instruction to make any such correction except in the case where the entry was obviously absurd or where a civil Court directs, a correction in any individual case. The Bench has left open the question whether in an appropriately framed suit a civil Court could decide what is the correct date of birth of an individual. G.O.Ms. No. 983, Education dated 5th April, 1949 however makes the position clear that the alteration in the date of birth can be asked for on the basis of some evidence, that the same will have to be established in a Civil Court and that it will not be proper for the Director of Public Instruction or the Government to conduct an investigation and order a correction. In 1951, the plaintiff and the school authorities proceeded on the footing that the school authorities themselves had no authority or responsibility in the matter and that the decision would have to be given by the Director of Public Instruction. The Director of Public Instruction refused relief only on the basis that the date of birth could not be altered at that stage. In other words, in substance what happened in 1951, was that the plaintiff mistakenly thought that it was the Director of Public Instruction who alone could make the necessary correction and applied to the Director of Public Instruction. The school authorities also proceeded on the same footing that they themselves had no volition in the matter and however satisfactory the evidence might be that was adduced by the plaintiff, the Director of Public Instruction alone would have to take a decision. What happened is that the plaintiff made an application before an authority without jurisdiction to get his date of birth corrected and he got a reply which by no means was an unequivocal or unqualified refusal to correct the date of birth. If, neither the Government nor the Director of Public Instruction havany jurisdiction to embark upon the investigation and finally determine the correct date of birth of a teacher in an educational institution any attempt made by the plaintiff to secure that result in the initial stages from the Director of Public Instruction would not start running of time against the plaintiff amounting to an accrual of a right to sue. In other words, what the plaintiff did was merely to approach somebody or some authority having no jurisdiction to decide the question and grant his request and that somebody declined to accede to his request. What happened again in 1960 is of no consequence on the same reasoning. Anyhow the suit has been filed on 15th April, 1961. In determining whether time has commenced to run under column 3 of Article 120, it is necessary that time should have commenced to run in respect of that particular suit and there should have been a demand to the person having authority to comply with the demand and that demand should have been refused in unequivocal terms. In this case, nothing that happened would start the running of time under column 3 of Article 120 of the Limitation Act. The correspondence which ensued between the parties far from indicating an unqualified refusal to recognise or accept the plaintiff's right shows that at one stage they (the school authorities) felt they were helpless in the matter and at later stages they were prepared to abide by what a civil Court would adjudicate as the correct date of birth of the plaintiff. At no point of time, was there a total repudiation or refusal by the authorities to recognise the plaintiff's right. As observed earlier in deciding whether there was a demand to the proper authority and a refusal to concede that right, we have to bear in mind that in 1955 the law was uncertain and educational institutions and others concerned were labouring

under an erroneous impression that the Director of Public Instruction had authority to embark upon investigation and determination of the correct date of birth of the employee concerned. For all these reasons, it has to be held that the plaintiff's suit is in time.

Learned Government Pleader relied upon an unreported judgment of Jagadisan, J. in S.A. No. 108 of 1958 and contended that the present suit was barred under section 42 of the Specific Relief Act. I have perused the judgment with care and I am of opinion that the facts in that case are easily distinguished from the instant case. In the first place, the relief that was asked for in that case was against the Director of Public Instruction for correcting the date of birth. The relief ought to have been asked for against the Corporation of Madras under whom the plaintiff therein was serving, and the Corporation of Madras was made a party in the Second Appeal for the first time. Further, at the time when the question came up for decision, the employee concerned had reached the age of superannuation and any question of correcting his date of birth had become academic at the time. In the view that the Director of Public Instruction was not in any way interested in denying the correct date of birth of the plaintiff whatever that might be, the learned Judge held that the plaintiff was not entitled to a declaration under section 42 of the Specific Relief Act. The suit was dismissed on the ground that the plaintiff there asked for a declaration of his correct date of birth as against the Director of Public Instruction who was absolutely unconcerned and disinterested in the matter and that the plaintiff had no cause of action at all against the Director of Public Instruction. It is pertinent to notice that at the end of the judgment, the learned Judge has left open the question as to what exactly would be the legal position if the plaintiff had filed the suit against the Corporation of Madras (the plaintiff's employer).

In the course of his judgment, the learned Judge had referred to some of the decisions which had considered the precise scope of section 42 of the Specific Relief Act and the circumstances under which a declaration could be granted and what can be held to be a dispute relating to legal character or any right to property within the meaning of section 42 of the Specific Relief Act. In the instant case, it has to be emphasised that the suit is not merely for a declaration of the date of birth of the plaintiff but also for an effective relief against the Government by way of mandatory injunction directing them not to retire or compel the retirement of the plaintiff except on the basis that the correct date of birth, is 27th November, 1908. Further the plaintiff has also impleaded the proper parties, namely, his employers, the school authorities as well as the District Collector for establishing his right that his date of birth is 27th November, 1908. The suit is therefore not for a bare declaration under section 42 of the Specific Relief Act. Prayers (*c*) and (*d*) in the present plaint are sufficient to show that the plaintiff has also asked for consequential or other effective reliefs following from his establishing that his date of birth is 27th November, 1908.

It is unnecessary to refer to the decisions of the various High Courts as to whether section 42 is exhaustive of all the circumstances under which a relief of declaration can be awarded to a litigant and whether the Court has jurisdiction to grant a declaration even in cases not covered by section 42 of the Specific Relief Act. In a recent judgment of the Supreme Court, in Civil Appeal No. 265

of 1964, it has been held, after referring to the case law on the point, that section 42 is not exhaustive of the cases in which a declaratory decree may be made and that the Courts have power to grant such a decree independently of the requirements of the section. It is sufficient to mention that the Supreme Court has made pointed reference to the decision of the Privy Council in *Sheoparsan Singh* v. *Ramanadan Prasad Singh*[24], which had given room for controversy that apart from section 42 of the Specific Relief Act, the Court, has no jurisdiction to grant a relief of declaration.

With great respect to the learned judge, Jagadisan, J., I do not see any reason why a plaintiff, an employee of a school should not be entitled to obtain a declaration from a civil Court as to his correct date of birth when a dispute has arisen between himself and the school authorities, especially when the Government Order mentioned earlier, says that appropriate remedy is to establish the correct date of birth in a civil Court. At that time when a dispute arises the teacher would not be entitled to any other consequential relief. He may have several years of service, further he is not necessarily obliged to ask for the correction of the date of birth entered in the service register. All that he is bound to establish in the presence of the school authorities is his correct date of birth so that the date of his retirement and other emoluments can be fixed. As has been pointed out so often Courts should not be astute or overzealous to apply the proviso to section 42 to deny a relief to which the parties are entitled though it may be a mere declaration, when such declaration would secure his rights to which he is legally entitled. In the instant case, at the time when the plaintiff instituted the suit he was still in service and it is not obligatory on his part to ask for any consequential relief. But at the same time a necessity has occurred which obliges the plaintiff to seek reliefs in a Court of law. It may be that if he is made or compelled to wait, evidence which may be then available to support his case would be lost by lapse of time. With respect I am of the view that apart from any other relief which the plaintiff has sought for in this case, the relief *simpliciter*, namely, that his correct date of birth should be declared in the presence of the affected authorities, namely the school authorities and the Government, is maintainable. The plaintiff in this suit has impleaded the proper parties and has also asked for other effective consequential reliefs. He is undoubtedly entitled to the relief of injunction against the authorities concerned preventing them from retiring or compelling the retirement of the plaintiff at an early date. In this case it is not claimed that the authorities of the school want to put an end to the services of the plaintiff on any other ground whatsoever. The only controversy between the parties has centered upon the correct date of birth of the plaintiff.

In 1974, V. Ramaswamy, J., in S.A. No. 1361 of 1971 dismissed the suit on the ground that the plaintiff came forward very late in his service for change of date of birth.

"The learned counsel for the appellant contended that even on the assumption that the plaintiff was born on 5th December, 1914, he was not entitled to the declaration. This contention is raised on the ground that the relief of declaration under section 34 is discretionary relief and since the plaintiff had kept quiet, though he was aware of the mistake as early as in 1939 and waited till the end of his service and just before his retirement, he is not entitled to the

24. I.L.R. 43 Cal. 694 (P.C.)

declaration in the suit. I am in agreement with this contention of the learned counsel. The plaintiff knew that his date of birth given in the service register was a mistake at least in the year 1939, when he got Exhibit A-3 the birth register extract, which was claimed by him as his birth extract. It was he who gave the date of birth at the time when he entered the corporation service in 1940. Even on the basis that his date of birth was 5th December, 1974 he was a major on that date and having given a declaration that his date of birth was only 22nd May, 1911, it is not open to him to urge that the date of birth given by him is not correct. Even assuming that at that time he was on a mistaken impression that he was born on 22nd May, 1911, at least in 1939 when he got the birth extract, he should have known that his correct date of birth was 5th December, 1914 and that the statement given by him on the earlier occasion was not correct. Still he did not take any steps to correct the date of birth. Further as late as in 1946, with reference to an insurance policy, again, he gave the date of birth as 5th December, 1914. Even thereafter he has not chosen to request the authorities to correct his date of birth. In the circumstances, I am unable to see any justification to grant the relief of declaration in this suit at this late stage. Therefore, though the plaintiff had made out a plausible case that his correct date of birth was 5th December, 1914, in view of the circumstances of this case, I am unable to exercise my discretion in his favour and grant the relief of declaration as prayed for in the suit.

The age in Courts is very interesting and fascinating. There are still cases before different forums of judiciary without giving finality to this question. My attempt is only to show the importance of the question, but not the finality of the problem. Just like the age increasing by efflux of time this question is also running not with a final destination.

SECTION 43-A COMPANIES

A CASE STUDY

By

T. R. VARAHAN, B. SC., F. C. A.

Private companies are exempted from the operation of several sections of the Companies Act and enjoy privileges principally on the ground that they are family concerns in which the public is not directly interested. Large business houses having substantial public interest, in order to have the benefits of such provisions register themselves as private companies and thereby get excluded from the rigours of the provisions of the Companies Act applicable to public companies. With a view to bringing such companies under the restrictive provisions of the Act applicable to a public company, Section 43-A was introduced in the Companies Act, 1956 by the Amendment Act of 1960. As per this section a private company would become a public company if 25 per cent. or more of its paid-up capital is held by one or more body corporate or bodies corporate, from the date on which such percentage was *first* held or in case of a company existing before the Amendment was introduced, within three months from the date on which the Amendment came into effect. The Companies Amendment Act of 1974, further extended the scope of section 43-A to

1. Private companies having a turnover of one crore of rupees and more and

2. Private companies which hold 25 per cent or more of the paid-up capital of a public company.

However with a view to protect genuine private companies which are purely family concerns and where no public interest is involved, exemption is given under sub-section (6) of section 43-A for the following categories of companies. The sub-section reads as follows:

(6) Nothing in this section shall apply—

(*a*) to a private company of which the entire paid-up share capital is held by another single private company or by one or more bodies corporate incorporated outside India; or

(*aa*) to a private company in which shares are held by one or more bodies corporate incorporated outside India, which or each of which, if incorporated in India, would be a private company within the meaning of this Act, if the Central Government, on an application made to it in this behalf by that private company, by order so directs; or

(*b*) to any other private company, if, but only if, each of the following conditions is satisfied, namely:—

(*i*) that the body corporate or each of the bodies corporate holding shares in the private company is itself a private company (hereinafter in this section referred to as a shareholding company),

(*ii*) that no body corporate is the holder of any shares in any such shareholding company.

(*iii*) that the total number of shareholders of the shareholding company, or as the case may be, of all the shareholding companies together with the individual shareholders (not including the persons referred to in sub-clause (*b*) of clause (*iii*) of sub-section (1) of section 3), if any, of the private company does not exceed fifty.

It is proposed to examine whether the provisions of section 43-A are applicable to the following cases:

Case 1:

A is a private limited company.

B and *C* are two other private limited companies holding more than 25 per cent of the paid-up capital of *A*.

Besides *C* also holds shares in *B*. Total number of members in all the three private companies together does not exceed fifty.

As *C* holds shares in *B*, which is a shareholding company of *A*, sub-clause 6 (*b*) (*ii*) would not be complied with in this case (*viz.* "that no body corporate is the holder of any share in such shareholding companies"). If so is *A* entitled to exemption given under section 43-A (6)? A careful reading of sub-clause (*i*) of clause (*b*) will answer the question in the affirmative.

The sub-clause (*i*) of the clause (*b*) of sub-section (6) states that the body corporate holding shares in a private company attracting the provisions of the section 43-A is thereafter referred to in that section (*i.e.*, 43-A) as "a shareholding company". This means that a new name is given to such category of private companies which hold shares in another private company attracting the provisions of section 43-A. Such companies should thereafter be referred to in that section only as "shareholding companies" and any general description such as "body corporate" etc., will not be applicable to them. If the intention was that such shareholding companies should also be prohibited from becoming members of another shareholding company for purposes of exemption under section 43-A (6) then they would have been specifically described as such, in clause (*ii*) as they would not come under the general description of 'body corporate' mentioned therein.

In other words the sub-clause (*ii*) of clause (*b*) should specifically state that no body corporate or a *shareholding company* is holder of any shares in the shareholding companies. This is on the legal principle *generalia specialibus non derogant* i.e., special provision will control general provision. Inasmuch as a special category of private companies called the 'shareholding companies' is introduced in sub-clause (6) of section 43-A with the specific statement that they will be described only so thereafter in that section, in the absence of any such specific mention in sub-clause (*ii*) of clause (*b*) of 43-A (6) the general term 'body corporate' occurring therein may not be applicable to such shareholding companies. This will amount to saying that when any shareholding company itself is a shareholder of another share-holding company the exemption under the section will continue to be available. In the circumstances it appears that *A* will still continue to be a private limited company.

Case 2:

X is a private limited company. On 1st January, 1970 *Y* Private Limited became a shareholder in *X*, by holding 30 per cent. of its paid-up share capital. On 1st January, 1974 *Z* Private Limited became a shareholder in *Y*. The total number of members in all the three companies together does not exceed fifty.

Here also the question arises whether *X* will continue to be a private company, in view of the requirement in sub-clause (*ii*) of clause (*b*) of sub-section 43-A (6) that no body corporate shall be a holder of any share in a shareholding company as defined in the said sub-section.

Now it will be seen that in the above case the provisions of sub-clause (*b*) of the sub-section (6) were complied with till 31st December, 1973 and till that date *X* continued to be a private limited company because of fulfilling the requirements specified in clause (*b*) of the sub-section (6). But on 1st January, 1974, when *Z* became a member of *Y*, which

is a shareholding company, the provisions of sub-clause (*ii*) of clause (*b*) of the sub-section (6) were contravened.

Now as per sub-section (1) of 43-A, *X* is deemed to have become a public limited company *on and from the date when* 30 *per-sent of its paid-up capital was first held* by *Y* *viz.* as and from 1st January, 1970. The word 'first' occurring in sub-section (1) of section 43-A is significant. That is to say, that though *X* continued to be a private company for 4 years from 1st January, 1970, by happening of an event after 4 years it became a public company with retrospective effect. Now, *prima facie*, it is impossible for *X* to have complied with the restrictive provisions that are applicable only to public companies with retrospective effect. *Lex non cogit ad impossibilia*, *i.e.*, law does not compel one to do that which cannot possibly be done.

Therefore it would appear reasonable to infer that the provisions of section 43-A would apply to such companies, only from the date on which they ceased to enjoy the exemption. It may be also seen from sub-section (7) of S. 43-A that every shareholding company should inform the private companies in which it holds shares about every change in its membership taking place by a change in the number of its individual shareholders/or by any body corporate becoming the holder of any of its shares. From this it appears that the intention of the legislature is that even *after* a shareholding company became a member of a private company if it does not continue to fulfil the requirements of the sub-clause (*b*) of the sub-section (6), the private company ceases to enjoy the exemption. But since there is no provision in the Act stating that such private companies become public companies from the date on which they ceased to enjoy the exemption under S. 43-A (6), it seems that the above intention has not been given effect to in drafting the Act. This is a case of *casus omissus* *i.e.*, a point or case unprovided for. The rule in such cases is that the particular case thus left unprovided for is governed by the law as it existed before such statute. (Broom's Legal Maxims 10th Edn. P. 363). Therefore such categories of companies as mentioned in the case will appear to fall outside the purview of section 43-A of the Companies Act, as their cases are not provided for in the Act. In the circumstances mentioned it is clear that *X* will continue to be a private company.

Similarly whenever there is a contravention of any of the other requirements of sub-section (6) as stipulated in clauses (*a*), (*aa*) and (*b*) of the sub-section, *after* a body corporate first held 25 per cent. or more of the paid-up share capital of a private company, either by way of a foreign company or a hundred per cent shareholding company transferring part of their holdings in the pirvate company or by a shareholding company becoming a public company or by the total number of members in all the concerned companies together exceeding fifty, the private company in question will be deemed to have become a public company with retrospective effect. But it would then be impossible for such a private company to have complied with the restrictive provisions of the Companies Act, 1956 applicable to a public company retrospectively. In such cases for the reasons stated *supra* the private company will continue as such because it falls outside the scope of section 4_-A. To enable such companies to give a certificate in the Annual Return, under sub-section (8) of section 43-A that the section (43-A) is not applicable to them, the Central Government may, by a notification amend Schedule V to the Companies Act, 1956 suitably.

SECTION 14 (i)(b), RENT CONTROL ACT, ABUSED

By

T. S. SUBRAMANIYA IYER, ADVOCATE, TIRUCHIRAPALLI-3

The object and aim of the Tamil Nadu Buildings (Lease and Rent Control) Act at the time of its inception in 1946 was to provide relief and protection to tenants in cities against the exploitation of landlords by seeking to evict them on unreasonable and untenable grounds. In the working and administering of the provisions of the Act till recently there has not resulted any palpable hardship either to the landlord or tenant all the while. But now for some time past, it seems the scale is tilting against the tenants, as if an infallible Eureka, has been enacted in section 14 (i) (*b*) of the Act in favour of the landlords. That is to say, with the exception of a few genuine cases, where the landlords do really demolish the building and erect a new building on the site of the building demolished, in the majority of cases coming under section 14 (*i*) (*b*) after getting an order of eviction and consequent possession, the landlords do not rebuild as undertaken, but put in another tenant at a prohibitively higher rent. Actually what has been done is a hoax played on the tenant. Perhaps one might say that under section 16 if demolition is not made and construction not started within the time undertaken by the landlord the tenant could give notice to the landlord of his intention to occupy the building and that if within 15 days from the date of receipt of such notice, the landlord does not put him in possession of the building the tenant may make an application to the Controller, within 8 weeks from the date in which he put the landlord in possession. Now is this action under section 16 in actual practice feasible or practicable ? There are hundreds of cases in which fabulously rich landlords owning hundreds of buildings have had recourse to section 14 (i)(*b*) of the Act and recovered possession of the building but have never reconstructed nor demolished the building. Why ? Because they know full well that the tenants once departed from their buildings and taken to new tenements scarcely wish to get back to the buildings dispossessed of them, by having recourse to section 16 and go the whole hog of a rent control case likely to be dragged on for a considerable length of time and incur a lot of expenditure, time, energy and waiting. We have not heard of even one case under section 16 of the Act filed anywhere.

And now lately section 14 (i) (*b*) has been made much easier by the law changing that what all is required of a landlord to prove is that he has the wherewithal to reconstruct the building thus obviating the old requirements that he must have applied to the municipality for a plan, get the required material for construction etc. etc. Thus the object of the Rent Control Act is whittled down resulting in an unfair advantage to the landlord as against the tenant, generally of the middle class or lower middle class. Section 14 (i) (*b*) has come to be an easy handle, an infallible panacea for the landlord against the tenant.

I believe the provisions of section 14 (i) (*b*) should be made somewhat more stringent if it is not to unduly harass the tenants now especially in the wake of the "20 Points Programme."

ESCAPED ASSESSMENT UNDER MADRAS CITY MUNICIPAL CORPORATION ACT, 1919.

By

R. THILLAI VILLALAN, M.A.B.L., *Corporation Legal Adviser, Madras.*

In all the laws of taxation, there are provisions for 'escaped assessment'.

In Income-tax Act, 1961 (XLIII of 1961) section 147 runs as follows :

Income escaping assessment : If

(*a*) the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer, or to disclose fully all material facts necessary for his assessment for that year, or ;

(*b*) Notwithstanding that there has been no omission or failure as mentioned in clause (*a*) on the part of the assessee, the Income-tax Officer has, in consequence of information in his possession, reason to believe that income chargeable to tax *has escaped* assessment for any assessment year,

he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute, the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereinafter in sections 148 to 153 referred to as the relevant year)

Explanation :-

For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has been under assessed ; or

(*b*) where such income has been assessed at too low a rate ; or

(*c*) where such income has been made the subject of excessive relief under this Act or under the Indian Income-tax Act, 1922 (XI of 1922) ; or.

(*d*) Where excessive loss or depreciation allowance has been computed.

Explanation 2 :—Production before the Income-tax Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section.

In Companies (Profits) Surtax Act, 1964, (VII of 1964) section 8 deals with profits escaping assessment and an extract of it is given below :

Profits escapting assessment—If

(*a*) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of the assessce to make a return under section 5 for any assessment year or, to disclose fully and finally all material facts necessary for his assessment, assessment chargeable profits for that year *have escaped assessment* or have been under-assessed or assessed at too low a rate or have been made the subject of excessive relief under this Act, or (*b*) notwithstanding that there has been no omission or failure as mentioned in clause (*a*) on the part of the assessee the Income-tax Officer has in consequence of information in his possession, reason to believe that chargeable profits assessable for any assessment year have *escaped assessment* or have been under-assessed or assessed at too low a rate or have been the subject of excessive relief under this Act,

he may in cases falling under clause

(*a*) at any time and in cases falling under clause (*b*) at any time within *four years* or the end of that assessment year, serve the assessee with a notice containing all

or any of the requirements which may be included in a notice under section 5 and may proceed to assess or reassess the amount chargeable to surtax and the provisions of that Act shall so far as may be, apply as if the notice were a notice issued under that section.

In Wealth-tax Act, 1957 (XXVII of 1957), section 17 deals with wealth escaping assessment

"If the Wealth-tax Officer

(*a*) has reason to believe that by reason of the omission or failure on the part of any person to make a return under section 14 of his net wealth or the net wealth of any other person in respect of which he is assessable under this Act for any assessment year or to disclose fully and truly all material facts necessary for assessment of his net wealth or the net wealth of such other person for that year, the net wealth chargeable to tax has *escaped assessment* for that year, whether by reason of under-assessment or assessment at too low a rate or otherwise ; or

(*b*) has, in consequence of any information in his possession, reason to believe, notwithstanding that there has been no such omission for railure as is referred to in clause (*a*), that the net wealth chargeable to tax *escaped assessment* for any year whether by reason of under-assessment or assessment as too low a rate or otherwise ;

he may, in cases falling under clause (*a*), at any time, within *eighty years* and in cases falling under (*b*), at any time within *four years* of the end of that assessment year, serve on such person a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 14, and may proceed to assess or reassess such net wealth, and the provisions of this Act shall, so far as may be, apply as if the notice had issued under that sub-section.

(2) Nothing contained in this section limiting the time within which any proceeding for assessment or reassessment may be commenced shall apply to an assessment or re-assessment to be made on such person in consequence of or to give effect to any finding or direction contained in an order under sections 23, 24, 25, 27 and or 29 :

Provided that the provisions of the sub-section shall not apply in any case where any such assessment or reassessment relates to an assessment year in respect of which an assessment or reassessment could not have been made at the time of the order which was the subject matter of appeal, reference or revision as the case may be, by reason of any provision limiting the time within which any action for assessment or reassessment may be taken. Similar provision is also found in the Gift-tax Act, 1958 (XVIII of 1959) under section 18.

(1) If the Gift-tax Officer—

(*a*) has reason to believe that by reason of the omission or failure on the part of the assessee to make a return under section 13 of the gifts made by him or any other person in respect of which he is assessable under this Act for any assessment year, or to disclose fully and truly all material facts necessary for assessment of the gifts made by him or such other person for that year, any reasonable gift has escaped assessment for that year, whether by reason of under-assessment or assessment at too low a rate or otherwise ; or

(*b*) has in consequence of any information in his possession, reason to believe, notwithstanding that there has been no such omission or failure as is referred to in clause (*a*) that any taxable gift has escaped assessment for any year, whether by reason of under-assessment or assessment at too low a rate or otherwise ; he may, in cases falling under clauses (*a*)

at any time within *eight years*, and in cases falling under clause (*b*) at any time within *four years* of the end of that assessment year, serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 13, and may proceed to assess or reassess any taxable gift which has escaped assessment, and the provisions of this Act shall, so far as may be, apply, as if the notice had issued under that sub-section; (2) nothing contained in the section limiting the time within which any proceedings for assessment or reassessment may be commenced shall apply to an assessment or reassessment to be made on the assessee or any person in consequence of or to give any effect to any findings or directions contained in an order under section 22, section 23, section 24, section 26 or section 28.

In the same manner, section 59 of the Estate Duty Act, 1953 (XXXIV of 1953) runs :

Property escaping assessment—If the Controller :—

(*a*) has reason to believe that by reason of the omission or failure on the part of the person accountable to submit an account of the estate of the deceased under section 53 or section 56 or to disclose fully and truly all material facts necessary for assessment, any property chargeable to estate duty has escaped assessment by reason of undervaluation of the property included in the account or of omission to include therein any property which ought to have been included or of assessment at too low a rate or otherwise, or

(*b*) has, in consequence of any information in his possession reason to believe notwithstanding that there has not been such omission or failure as is referred to in clause (*f*) that any property chargeable to estate duty has *escaped assessment* whether by reason of under-valuation of the property included in the account or of omission to include therein any property which ought to have been included, or of assessment at too low a rate or otherwise,

he may at any time, subject to the provisions of section 73-A, require the persons accountable to submit an account as required under section 53 and may proceed to assess or reassess such property as if the provisions of section 58 applied thereto. In a similar way, section 16 of the Tamil Nadu Sales Tax Act, 1959 (I of 1959) has been framed. An extract of it is given below :

Assessment of escaped turnover—(1) (*a*) Where, for any reason, the whole or any part of the turnover of the business of a dealer has *escaped assessment* of tax the assessing authority may, subject to the provisions of sub-section (2) at any time within a period of *five years* from the expiry of the year to which the tax relates determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable in such turnover after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.

(*b*) where, for any reason, the whole or any part of the turnover of the business of a dealer has been assessed at a rate lower than the rate at which it is assessable, the assessing authority may, at any time within a period of five years from the expiry of the year to which the tax relates, reassess the tax dues after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such reassessment.

(2) In making an assessment under clause (*a*) of sub-section (1) the assessing authority may, if it is satisfied that the escape from assessment is due to wilful

non-disclosure or assessable turnover by the dealer order him to pay, in addition to the tax assessed under clause (a) of section (1), a penalty not exceeding one and a half times the tax so assessed :

Provided that no penalty under sub-section (2) shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition.

(3) The powers under sub-section (1) may be exercised by the assessing authority even though the original order of assessment, if any, passed in the matter has been the subject-matter of an appeal or revision.

(4) In computing the period of limitation for assessment or reassessment under this section the time during which the proceedings for assessment or reassessment remained stayed under the order of a civil Court or other competent authority shall be excluded.

A comparative study of these provisions will reveal that the language and spirit are similar and only the method of charging to tax and computation, the extent and area of taxation and the period of retrospective effect are different.

In this article, I shall confine myself to the provision found in the Madras City Municipal Corporation Act of 1919 (IV of 1919). I am reproducing section 137-B of the Act hereunder :

Power to assess in case of escape from assessment: Notwithstanding anything to the contrary contained in this Act or rules made thereunder, if for any reason any person liable to pay any of the taxes or fees leviable under this chapter has escaped assessment in any half year or has been assessed in any half year or year at a rate lower than the rate at which he is assessable or in the case of property tax has not been duly assessed in any half year or year consequent on the building or land concerned having escaped proper determination of its annual value, the Commissioner may, at any time within three years from the date of which such person should have been assessed serve on such person a notice assessing him to the tax or fee due and demanding payment thereof within fifteen days from the date of such service; and the provisions of this Act and the rules made thereunder shall so far as may be apply as if the assessment was made in the half-year or year to which the tax or fee relates.

The crucible in which the section was put for melting and recasting, may be noticed:

The history starts from the year 1929. First, it was ruled that the escaped assessment can be from the date of the assessment but not with retrospective effect for any period.

This ruling was given under sections 111 and 113 of the Act in *Prince of Arcot* v. *Corporation of Madras*[1]. The relevant portion of the judgment of Mr. Justice Waller and Mr. Justice Krishnan Pandalai is given below :—

"The questions referred to us under rule 17 of the Taxation Rules of the Madras City Municipal Act of 1919 are three in number :—

Is the assessment to profession tax of the Prince of Arcot under rule 8 of the Taxation Rules and section 113 of the City Municipal Act made on the 5th of September, 1926 invalid for the ten half years commencing from the second half year of 1920-21 ?

The second and third questions referred may be disposed of together. They raise the question whether the assessment of the appellant made on 15th September, 1926, for ten half years commencing from the

1. (1929) 57 M.L.J. 536 : I.L.R. 52 Mad. 866 ; 30 L.W. 261 : A.I.R. 1930 Mad. 200.

second half year of 1920-21, and purporting to be made under rule 8 of the Taxation Rules and section 113 of the City Municipal Act was valid.

The appellant was on 15th September, 1926 *i.e.*, within the first half year of 1926-27, assessed to profession tax for that half year and eleven previous half years, or six years in all. The reference relates only to the first ten half years of the above period apparently because the appellant did not question the opinion of the learned Chief Judge of the Small Cause Court who heard this matter that it was competent to the respondent to assess the appellant for the half year in which the assessment took place and for one previous half year or a period of a year in all. It is not disputed that the respondent was authorised if the appellant was otherwise liable to profession tax, to assess him for the half year in which the assessment was made.

The dispute was about the eleven previous half years and though the reference expressly relates to the first ten of those half years, if the opinion of this Court in the matter referred affects the assessment for the eleventh half year which has been left out from the reference, it is competent to this Court under rule 18 of the Taxation Rules to pass such order as it thinks fit.

The argument for the respondent-Corporation is firstly, that profession tax becomes due and owing as soon as the minimum period of sixty days required by section 112 has expired even without anything done on the part of the Corporation to assess it and inform the assessee of the amount payable and secondly, that even if the tax becomes due and owing only after assessment and intimation of the same to the assessee, it is open to the Corporation to assess a person to the tax at any future time within six years after the expiration of the half year for which the assessment is made.

We think that these contentions cannot be upheld. In the first place the profession tax becomes due and owing not merely by the exercise of the profession, art, trade or calling during the period required by section 113, but by the assessment to the tax based upon such exercise. Reliance is placed on the words in that section that 'if the tax due in respect of all the half years is not paid, the Commissioner shall cause a notice to be served on such person'. By section 138, the rules, and tables embodied in schedule IV shall be read as part of chapter V in which the sections relating to profession tax and other taxes occur. By section 111 profession tax is imposed upon persons who fall 'within' one or more of the classes of persons specified in the taxation rules in schedule IV 'and the amount payable is a tax as determined under the said rules'. Rule 8 of schedule IV provides that persons shall be assessed by the Commissioner to the profession tax under one or other of the nine classes therein specified on a scale to be determined within certain limits by the Corporation from time to time. By Rule 9, the Commissioner is authorised in the case of persons not drawing a fixed salary to determine the class in which a person falls on certain general considerations but without calling for accounts from the assessee. Rule 12 gives an assessee to profession tax who is dissatisfied with the assessment by the Commissioner the right to apply to him for revision, provided the application is delivered to the Municipal office within 15 days from the date of the service of the notice under section 113. This indicates clearly that the tax said to be due in section 113, is that to which the assessee has been first assessed under the powers conferred by rule 8. It also shows that the notice under section 113 is the initial and essential step in the process of final determination of the tax according to the provisions for revision of the assess-

ment for until that notice is served and for 15 days thereafter the right of claiming revision is preserved. That notice has another importance because under rule 22 in respect of the tax demanded distraint proceedings may be taken if it is unpaid for 15 days and the omission is not satisfactorily explained. Rule 14 provides that if the assessee is dissatisfied with the orders of the Commissioner on an application for revision, the application must be heard and decided by the standing committee and a copy of the committee's decision should be sent to the applicant within two days thereof. Rule 15 then confers on the assessee a right of appeal to the Small Cause Court provided notice of appeal is given to the Corporation within 10 days and the appeal itself is presented in 14 days from the date of the decision of the standing committee and the applicant has paid in the case of a tax leviable by half yearly instalment (profession tax is such a tax) the half yearly instalment due under the order appealed against. From the above provisions it is clear that the tax is not due till the Commissioner has assessed the person liable and that even then it is only provisionally fixed for it is liable to revision in the manner mentioned above.

A reference to the corresponding provisions of the Acts 1 of 1884 and III of 1904 shows that the machinery of assessment and revision provided for in those Acts in the body of the Acts is, in the present Act of 1919, relegated to schedule IV. The comparison is instructive as showing that the dissatisfaction of assessment by the Commissioner is as essential now as it was under the former Acts. A bird's eye view of the comparative provisions of the two earlier Acts will be found in *Veeraraghavalu* v. *The President of the Corporation of Madras*[2]. Under section 101 of the Act of 1884 corresponding to section 118 of the Act of 1904 the President was required to keep lists of persons liable to pay profession tax and other taxes. In schedule IV of the present Act, rule 1 requires the commissioner to prepare and maintain property tax registers. Section 120 of the Act of 1904 made persons exercising a profession or holding an appointment in the city liable to pay profession tax. Section 111 of the present Act corresponds to this. Section 104 of the Act of 1884 corresponding to section 121 of the Act of 1904 empowered the President to determine in which of the classes any person was to be placed and to revise such classification from time to time. Now rule 8 of schedule IV empowers the commissioner to assess persons to profession tax under one of the nine scheduled cases and rule 14 empowers him to revise the classification. Section 106 of the Act of 1884 corresponding to section 125 empowered the President in case the tax due on assessment or revision was unpaid, to send a notice that in case the tax was unpaid for 15 days after service of the notice the defaulter will be prosecuted and section 420 of the Act of 1904 empowered the Magistrate to impose a penalty of twice the amount of the tax. In the present Act prosecution for non-payment of profession tax has been done away with, but the notice mentioned in section 113 corresponds to the notice mentioned above and the present notice has two objects. It enables the assessee if he so desires to apply in 15 days to get the assessment revised and the Corporation, in case the tax remains unpaid for 15 days without good cause, to distrain the defaulter's goods. It follows that neither under the old Acts nor under the present can the profession tax be said to be 'due' till the proper authority has assessed the same by the name of the assessee being placed in the proper class. Under section 370 (a) of the present Act such act of classification or assessment should be evidenced

2. I.L.R. 34 Mad. 130; 20 M.L.J. 773.

by a writing signed by the Commissioner or by some Municipal official delegated by him in writing under section 16, and it is noteworthy that under this last section the power of revision given to the Commissioner by rule 14 cannot be delegated.

But it is urged that no time is fixed for the Commissioner to make the assessment and that it is therefore open to him to make assessments backward for a period of 6 years. This limit on the alleged power of backward assessment is suggested on the ground that the period of limitation for bringing a suit under section 396 for a tax after it has become due and owing is six years. But if the power of backward assessment exists, the limit suggested for its exercise disappears. For the right to sue accrues only after the tax has become due and if it becomes due, as we have held it does, only on assessment by the Commissioner, the period of limitation for any suit must begin from the date of the assessment. In other words, the contention for the Corporation leads logically to the result that, though once a tax is assessed and has become due, the Corporation has only six years to recover it by suit, yet the Commissioner is authorised to put off assessing persons to profession tax for an unlimited period and so put off indefinitely the due date of the tax and the liability of the assessee. The startling nature of this result is what compels the respondent to impose on himself a supposed limit, really illusory of 6 years for the exercise of the power contended for. By itself this would be a strong ground for insisting upon explicit and clear foundation in the provisions of the Act and the rules thereunder for the existence of such a power. It is admitted that there is no express provision in the Act and the rule which confers any such authority. But it is said that there is also nothing which negatives it and in the absence of any such prohibition the authority must, it is argued, be deemed to exist. But on an examination of the scheme and purpose of the City Municipal Act and or general grounds of construction of similar enactments we are unable to read, by implication into that Act, the power contended for.

The scheme for imposition, assessment and collection of taxes laid down in the Act would seem to show that while the rate of taxation is fixed for each year beginning with 1st April, by the council at the Budget meeting in the February, previous (section 156) the assessment of taxes payable by each individual is a contemporaneous operation within the period of taxation (year or half year) in which while the Commissioner is afforded facilities for obtaining all relevant information on which the assessment is to be based (see sections 114, 115 and 368) the assessee is required to pay within a very short time after the assessment. It is hardly consistent with this scheme that the tax fixed by the council, say for 1920-21, in February, 1920 should have to be assessed and realised from the individual tax-payers within six years (as we have pointed an unlimited number of years) later, when the Commissioner charged with the duty of assessment would find that all relevant information has ceased to be available and the assessees might long ago have ceased to exercise the profession and enjoy the income or salary from which he might be expected to pay the tax. In the case of companies tax, to which similar provisions as those applicable to profession tax are applicable, the incongruity is still more marked. No big concern like a limited company with obligations to its shareholders which has to produce a balance sheet in each working year and on the result of that balance sheet to declare dividends to its shareholders could be carried on if its municipal assessment in that year is uncertain and is liable to be suddenly demanded for several years together at a perfectly unknown and indefinite date. The learned

Chief Judge has referred to other aspects of the hardship to which assessee would be put if the power contended for by the Corporation were upheld. We think it unnecessary to refer to them.

In rule 6, schedule IV of the Act it is expressly provided that when the Commissioner makes an amendment of the property tax register, as he is empowered to do under rule 3 by altering, adding or deleting items therein, such amendment shall be deemed to have taken effect from the earliest date in the current year in which the circumstances justifying the amendment existed. This rule is remarkable both for what it enacts and for what it forbids. In the case of property tax if a property has escaped taxation for a period of years, the Commissioner may in any subsequent year by amending the register assess it to the tax. But the rule says that the tax is to be operative only from the earliest date in the current year in which the omission was rectified. Similarly, if a property has been taxed too low, the Commissioner may amend the register. But in that case also the enhanced tax due to the amendment takes effect only from the earliest date in the year current when the amendment was made on which the property was liable to the enhanced tax. The careful prohibition against retrospective assessment in the case of property tax beyond the beginning of the current year is to our mind a very strong indication that in the case of other taxes like the profession tax retrospective assessment to a greater extent was not contemplated. Property tax is a yearly tax though payable half yearly. Profession tax is a yearly tax. With this difference, if the analogy of the property tax may be used, the inference would seem to be that the power of assessment conferred by rule 8 of the Taxation Rules to be properly exercised must be exercised within the half year to which the assessment relates.

Further the companies tax imposed by section 110 and the profession tax imposed by section 111 are expressly by those sections levied 'by way of licence fee and in addition to any other licence fee that may be leviable under this Act'. The tax on carriages and animals imposed by section 116 is another instance of a licence fee described as a tax. This is made clear by section 121 which says that when the tax due on any carriage or animal is paid the Commissioner shall grant the person a licence to keep such carriage or animal for the period to which the payment relates and by section 360 which speaks of the licence under section 121 in connection with the prosecution of a defaulter. The other licence fees referred to are those leviable under chapter XII of the Act and schedule VI thereof read with section 365 (2). The essence of a licence is that it is a permission which must be usually obtained before the thing licenced is done (Wharton's Law Lexicon, page 428). The City Municipal Act in several sections (*e.g.*, sections 287, 290 and 295) requires that the licence mentioned therein should be obtained in respect of an existing undertaking within the first month of the year and in respect of new undertakings before they begin and it is an offence to carry on an undertaking which requires a licence without it. In the case of such licences, those who ought to get them are expected to apply for and obtain them on payment of the fees fixed by the Council under section 365 (2). In default, they stand the risk of prosecution and the Magistrate is required in case of conviction to recover in addition to any fine that may be imposed the licence fee and pay it over to the Corporation. But this coercive recovery of the fee does not entitle the convicted person to the licence which if wanted must be obtained by further payment (section 365 (8) and (9). In the case of licence fees described as companies tax and profession tax the

amount of which depends on the rates fixed by the council and on the classification of the particular individual in one of several classes (and this is true to a certain extent in respect of the tax on vehicles and animals) the fact that the levy is still declared to be by way of licence fee strengthens the inference that the assessment is intended to be made before or during the period to which it relates and could not have been intended to be made long afterwards retrospectively for several periods together.

When the words of an enactment are clear and imperative, considerations of inconvenience or hardship have no place in its application to circumstances falling within the words. But where there is no express indication in an enactment as to whether the powers given by it were meant to be used in particular circumstances, the fact that great hardship and inconvenience would result thereby is a reason for so construing the words as to meet all attempts to abuse the power either by exercising them in cases not intended by the statute or by refusing to exercise them when the occasion for their exercise has arisen. (Maxwell on Interpretation of statutes, 6th edition, page 226). Statutes which impose pecuniary burdens are subject to the rule of strict construction and in a case of reasonable doubt the construction most beneficial to the subject is to be adopted (*ibid.*, pages 503 and 504) though the principle of strict construction is less applicable where the powers are conferred on public representative bodies for essentially public purposes (*ibid.*, page 530). The only inconvenience that may be urged to result from the Corporation not having the power contended for is that some persons who may have escaped taxation to profession tax in previous years cannot be assessed thereto in subsequent years. But the inconvenience, if such it really is, already exists in respect to property tax, by far the most important source of municipal revenue. And after all if the municipal executive is vigilant and efficient such cases must be comparatively rare. On the other hand, a power to assess persons for many years retrospectively if granted is more likely to encourage slackness and inefficiency on the part of the municipal executive and also will produce very great hardships on those who are suddenly called upon to pay in a sum the taxes which ought to be met out of current income. The present case in which the appellant was called upon to pay in addition to the tax for the current half year a sum of Rs. 4,600 and odd on account of eleven half years arrears is a good illustration. We can find no justification for this either in the express terms of the Act or in any reasonable construction of its intention. The decision in *Gill* V *Mellor* v. *Gill* V *Monday*[3], is no authority in favour of the respondent, as in that case the necessary steps had been taken in previous years to make the rate an arrear and all that remained was its collection. The decision was merely that when a rate is duly made and published, it is the duty of the parties concerned to seek the collector and pay it. Having regard to the difference between the procedure prescribed for making and publishing the rates according to the English Acts and that prescribed for the assessment of property tax under the City Municipal Act, the appellant not having been assessed at all in respect of the previous back years before 15th September, 1926 there was no arrears before that date.

Our conclusion on the second and third questions referred is that liability to pay profession tax arises only after the assessment under rule 8 of the Taxation Rules, and that the appellant the Prince of Arcot, not having been assessed in respect of the eleven half years commenc-

3. (1924) 1 K.B. 97.

ing from the second half year of 1920-21, within the several half years, the assessment of 15th September, 1926 was invalid in respect of those eleven years.

To overcome the difficulty created by this decision, *i.e.*, such assessment must be made in each respective half year, and hence, profession tax for any half year prior to the current half year cannot be levied unless it had been assessed in the half year, section 137-B was inserted in the Act by section 81 of the Madras City Municipal Amendment Act (X of 1936).

The mere reading of the whole judgment of the Chief Justice Rajamannar, and Justice Viswanatha Sastri in the *Bombay Life Assurance Society Limited, by its Agents S.A Rangaswami and Brothers* v. *The Council, Corporation of Madras*[4], will give a clear picture of the legal position at that time. This decision, makes the following rulings.

There is nothing in the language of section 137-B, Madras City Municipal Act, which compels the Court to exclude from the scope of its application the property tax leviable under the Act.

The operation of section 137-B of the Act is confined to cases of complete escape of assessment and does not extend to cases where there has already been an assessment, but at a lesser amount than what is proper.

The important portions of the judgment are set out hereunder:—

The Chief Justice:—This is a reference made by the Court of Small Causes Madras, under rule 17 of schedule IV of the Madras City Municipal Act (IV of 1919) (hereinafter referred to as the Act). The questions of law referred for the decision of this Court are the following:—

(1) whether by reason of the issue of two notices, Exhibits A-1 and A-2 simultaneously with Exhibit A-3 the 1st mentioned notice is invalid and as a consequence the levy of tax on escaped assessment under section 137-B of the City Municipal Act is also invalid?

(2) Whether section 137-B of the City Municipal Act applies to a case of escape of tax on property?

(3) Whether the operation of section 137-B is confined to cases of complete escape of assessment or extends also to cases where there has already been an assessment, but at a lesser amount than what is proper?

The Bombay Mutual Life Assurance Society Limited, which was the appellant before the Court below is the owner of the premises No. 378, China Bazaar Road, Madras. An amount of Rs. 856-2-0 was demanded from the company as the property tax due in respect of the said premises for the first half year 1946-47 and was duly paid. The tax was demanded in that sum calculated on an annual valuation of the property at Rs. 7,644. On 28th February, 1947 three notices were issued by the Corporation of Madras purporting to be under rule 3 and rule 3-A of Schedule IV and section 137-B of the Act. The notice under rule 3 (Exhibit A-2) intimated to the appellant that the property tax assessment books would be amended by altering the annual value of the property, and the amount of the property tax payable thereof from the valuation of Rs.7,644 and tax of Rs. 856-2-0 to the valuation of Rs. 23,380 and tax of Rs. 2,618-8-11 in respect of the property in question for the first half year 1946-47 and further intimated that any objection to the amendment would be heard by the Revenue Officer on 6th March, 1947. The

4. (1951) 1 M.L.J. 220 : I.L.R. (1951) Mad. 907 ; 64 L.W. 229 : A.I.R. 1951 Mad. 725.

notice under rule 3-A Exhibit A-1 bearing the same date was to the effect that the assessment on the property had been enhanced by raising the annual value thereof from Rs. 7,644 to Rs. 23,380 for the first half year 1946-47 and intimated that a petition for revising the assessment would be considered if it reached the Municipal Office within thirty days from the date of service of the notice. The third notice Exhibit A-3 also of the same date purporting to be under section 137-B of the Act was as follows:

"whereas you are the owner of the buildings and lands shown in the schedule below (herein afterreferred to as premises); whereas under section 104 of the City Municipal Act you are the person liable to pay the property tax assessed on the premises;

whereas the premises were assessed for property tax for the half year ending 30th September, 1946, on an annual value of Rs. 7,644 and on such assessment a sum of Rs. 856-2-0 was paid;

whereas the annual value of the premises which shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month in the abovementioned half year namely the half year ending 30th September, 1946, was Rs. 23,380 and the property tax payable thereon was Rs. 2,818-8-11 and not Rs. 856-2-0 at which the premises were assessed;

whereas you have in consequence escaped assessment in the aforesaid half year and you are liable to pay the amount of tax which has escaped assessment, namely, a sum of Rs. 2,618-8-11,

I, hereby, in exercise of the powers conferred upon the Commissioner by section 137-B of the Madras City Municipal Act and delegated to me under section 16 thereof give you notice assessing you to the tax of Rs. 2,618-8-11 which has escaped assessment and I hereby demand payment thereof within fifteen days from the date of service of this notice. Please take notice that if payment is not made within the period abovementioned, steps will be taken against you for realisation of the aforesaid amount of Rs. 2,618-8-11.

Premises above referred to: No. 378, China Bazaar Road, 8th division.

The appellant availed himself of the remedies provided by the Act. There was an appeal to the Taxation Appeals Committee before whom he was unsuccessful and there was a further appeal to the Court of Small Causes at Madras which was also dismissed. The appellant thereafter applied to that Court to make a reference to this Court under rule 17 of schedule IV of the Act and accordingly this reference was made.

The second and third questions call for a construction of section 137-B and arguments of counsel on both sides were practically confined to these two questions.

Section 137-B runs thus:

"Notwithstanding anything to the contrary contained in this Act or the Rules made thereunder if for any reason any person liable to pay any of the taxes or fees leviable within three years from the date on which such person should have been assessed, serve on such person a notice assessing him to the tax or fee due and demanding payment thereof within fifteen days from the date of such a service and the provisions of this Act and the rules made thereunder shall, so far as may be, apply as if the assessment was made in the half year or year to which the tax or fee relates".

To appreciate the contentions of parties as regards the construction of this section it is necessary to have a brief survey of all the material provisions relating to the property tax which are contained both in

the Act and in schedule IV to the Act. Under section 98 of the Act, the council may levy among other taxes, property tax: If the council by resolution demands that a property tax shall be levied such tax shall be levied as such on all buildings and lands within the city save those exempted whether under that Act or any other law (section 99 (1)). The property tax comprises a tax for general purposes, a water and drainage tax and lighting tax. These taxes shall be levied at such percentages of the annual value of the buildings and lands as may be fixed by the council (section 92(2)) and for the purpose of assessing the property tax, the annual value of any building or land shall be determined by the Commissioner (section 99 (3)). The method of assessment of the property tax is set out in section 100. The annual value of the lands and buildings shall generally be deemed to be the gross annual rent at which they may at the time of assessment reasonably be expected to let from month to month or from year to year less certain deductions. Section 103 declares that the property tax shall subject to the prior payment of the land revenue due to the Government, be a first charge upon the buildings and lands and upon the moveable property, if any, found within or upon such buildings or lands belonging to the person liable to such tax. The property tax shall be levied every half year and shall except as otherwise expressly provided in schedule IV be paid by the owner of the assessed premises within fifteen days after the commencement of the half year (section 104). The express provision in schedule IV referred to is that under which an occupier of a property may be called upon to pay the tax, though he may not be the owner. Section 106 lays down the relative obligations of transferor and transferee in respect of the tax. Section 109 confers on the Commissioner power to call on the owner of any property to furnish him with returns of the rent payable for it, the cost of erecting the building and other information for the purpose of assessing the property tax.

The procedure for assessment, levy and collection of the property tax is laid down in schedule IV, part I-A. Part I contains provisions common to taxes in general. The material provisions of part I-A which have a bearing on the questions to be decided in this case are the following. The Commissioner shall enter in the assessment books the annual value of all lands and buildings and the tax payable thereon (rule 1-C). These books shall be completely revised by the Commissioner once in every five years (1-D). An assessment once made shall continue in force until it is revised and until the revised assessment takes effect (1-E). Rule 2 relates to the preparation of the assessment books for the first time and to the general revision of such books. The aggrieved parties are given the right to file revision petitions in respect of the entries in the books so prepared or revised. Rules 3 and 3-A are very important and they are in these terms.

"3. The Commissioner may after giving notice to the parties concerned and hearing their objections if any, amend the property tax assessment books at any time between one general revision and another by inserting therein or removing therefrom any property or by altering the valuation of any property or the amount of tax. Such amendment shall be deemed to have taken effect on the first day of the half year in which it is made:

Provided that when the amendment is made in any half year after the demand notice for that half year has been issued, it shall have effect only from the succeeding half year.

3-A. In every case in which between one general revision and another the

Commissioner assess any property for the first time or increases the assessment on any property otherwise than in consequence of a general enhancement, the Commissioner shall intimate by a special notice to the owner or occupier of such property that a petition for revising the assessment will be considered if it reaches the municipal office within thirty days from the date of service of such notice in the case of Government, a railway administration or a company and within fifteen days from the said date in other cases.".

Rule 4 provides for revision petition to reduce the tax on the ground that the annual value has decreased since the last assessment. Part VI of the same schedule contains rules relating to the collection of taxes including the property tax and it is this provision which is referred to in section 104 already mentioned.

The first contention on behalf of the appellant which is embodied in question 2 is that section 137-B will not apply to property tax. The argument is based entirely on a distinction sought to be made between assessment on a person and assessment on a property. Under the several provisions of the Act, the property tax is assessed on the property. In contradistinction the profession tax is assessed on the person. Though it is correct to say that in the last instance it is the person who is liable to pay the property tax as much as any of the other taxes, nevertheless in the case of property tax, it is the property that is assessed; the person himself never is. So when section 137-B speaks of the person having escaped assessment, it can only have reference to a tax which can be properly described as a tax assessed and the words 'a notice assessing him to tax' clearly indicate that the tax is one which is assessed on the person and this could not be property tax because it is the property that is assessed. So the argument ran. Reference was made to section 99 of the Act which says that the property tax is levied on all buildings and lands, to section 100 which provides that every building shall be assessed in a particular manner, to the expression 'the assessed premises' in section 104, and a like expression in section 106 (4). In antithesis, our attention was drawn to rules 7 and 8 of schedule IV which provides that companies and persons shall be assessed. Much reliance was also placed on the use of the word 'assessed' in a section 11 (1) (*b*). It was therefore urged that when section 137-B refers to a person having escaped assessment and to a person who should have been assessed and to assessing him to the tax, it could not be in respect of the property tax, because under the Act the property tax is assessed and levied on the property and not on the person.

In my opinion, it will be most unsafe to draw any inference from the mere use of the words 'assess' or 'assessment'. These words do not have one and only one meaning and connotation. In taxation statutes, the word 'to assess' is 'to impose the tax' and sometimes is used as meaning 'to fix the amount of tax'. The word 'assessment' in the Indian Income-tax Act does not have the same meaning throughout the Act. Lord Romer in *Commissioner of Income-tax* v. *Khemchand Ramdas*[5], observed:

"One of the peculiarities of most Income-tax Acts is that the word 'assessment' is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the taxpayer".

In the *Income-tax Commissioners for London (City)* v. *Gibbs*[6], Viscount Simon, L.C., said:

5. (1938) 2 M.L.J. 115 : 65 I.A. 236 : I.L.R. (1938) Bom. 487 : A.I.R. 1938 P.C. 175.
6. (1942) A.C. 402: (1942) 1 All E.R. 415.

"The word 'assessment' is used in our Income-tax Code in more than one sense. Sometimes by 'assessment' is meant the fixing of the sum taken to represent the actual profit for the purpose of charging tax upon it. In another context the 'assessment' may mean the actual sum in tax which the tax payer is liable to pay on his profits. These two things are of course, not the same......It is remarkable that these two separate meanings of the word 'assessment' may occasionally be found within the bounds of a single section. Lord Macmillan in the same case makes the following caustic comment;

Verbal consistency is the last virtue that can be attributed to a Code which uses so vital a term as 'assessment in not less than eight differing senses'.

If this be so where qualified persons draft the enactment in their own language it is idle to expect draftsmen using a foreign language to be consistent in the use of the word 'assessment'. We respectfully follow the dictum of Lord Wrenbury.

No reliance can be placed upon an assumption of accuracy in the use of language in these Acts (*Kensington Income-tax Commissioner* v. *Aramayo*[7]).

That the words 'assessed' and 'assessment' have been used in the City Municipal Act indiscriminately to import different processes in taxation can be demonstrated by a few references. In section 99 (3) we have the words 'for the purpose of assessing the property tax". Here the 'assessing' evidently means reckoning or calculating or fixing, but it is the tax which is said to be assessed, *vide* also section 109 (1). In the very next section namely section 100 (1) every building is to be 'assessed' together with its site and adjacent premises. Here apparently it means 'valued'. In schedule IV, part I, which contains provisions common to taxes in general, rule 1 provides that the Commissioner shall prepare and keep assessment books in such form as he thinks fit showing the persons and property liable to taxation. Under rule 12 any assessee who is dissatisfied with the assessment of any tax under this Act other than the property tax, the transfer duty and the tax on timber may make an application in writing to the Commissioner for the revision of such assessment. Here 'assessment' may mean the fixing or levy, but rule 13 (*b*) mentions the tax based on the 'assessment prevailing' in the year previous to the year in question. A distinction is made between tax and assessment and there is mention of the tax being based on the assessment. In my opinion much cannot be made out of the use of the words, 'assessment' and 'assess' in section 137-B. It expressly applies to any person liable to pay any of the taxes leviable under that chapter, *i.e.*, chapter V. Now, certainly one of the taxes which a person is liable to pay is the property tax on property belonging to him. Though the property tax may be calculated on its annual value and therefore in one sense it may be said that it is assessed on the property *i.e.*, it is reckoned on the value of the property, there can be no doubt that it is the person *i.e.*, the owner (and it may be on occasions the occupier as well) who is liable to pay the tax when assessed. We do not think it very inaccurate to speak of the owner of a property being assessed to the tax on property belonging to him. Rigby, L.J., in dealing with the word 'assessed' with reference to water rate remarked:

"The word "assessed is reckoned on the value. It is not accurate to say "assessed on the premises" but it is not very far from accurate to say that a water rate is a rate assessed upon the lessees in respect of the house (*Re. Floyd* v. *Lyons and company*)[8].

7. (1916) 1 A.C. 215: 6 T.C. 613.

8. (1897) 1 Ch. 633.

Then again except in rule 8 nowhere else in the Act or in the rules are persons mentioned as being assessed to any tax. The word is not used in the provisions relating to tax on carriages and animals but it would not be inaccurate to say that a person being in possession of a taxable carriage has been assessed to the tax on the carriage.

In my opinion there is nothing in the language of section 137-B which compels us to exclude from the scope of its application the property tax leviable under the Act. My answer to question No. 2 is in the affirmative.

The last question remains. Section 137-B was inserted in the Act by section 81 of the Madras City Municipal Amendment Act X of 1956. This Act also made important changes in the provisions contained in schedule IV. To understand the scope of the new section it is necessary to acquaint ourselves with the scheme of assessment in respect of the property tax before the amending Act Before the amendment, part I of schedule IV contained the rules relating to the assessment of the property tax. Rule 1 corresponded to the present rule 1-A, rules 1-D and 1-E are new. Rules 3, 4, 5 and 6 in Schedule IV as they stood before the amendment ran as follows:

"3. The Commissioner shall amend the property tax registers by altering, adding or deleting items as circumstances may require.

4. In every case in which any building or land is assessed for the first time, the Commissioner shall give the owner or occupier special notice of the assessment.

5. In every case in which the assessment on any building or land is increased, otherwise than in consequence of the enhancement by the council of the rate at which the property tax is leviable, the Commissioner shall give the owner or occupier special notice stating the amount of the increase and the reasons therefor.

6. When the Commissioner makes an amendment under rule 3 it shall be deemed to have taken effect from the earliest date in the current year in which the circumstances justifying the amendment existed; no instalment of the property tax at the revised rate shall however, be payable until fifteen days after the service or sending of the notice required by rule 4 or rule 5.

It is important to note that while rule 6 before the amendment provided that an amendment shall be deemed to have taken effect on the first day of the half year in which it is made a proviso is added that when the amendment is made in any half year after the demand notice for that half year has been issued, it shall have effect only from the succeeding half year.

In the sister Act relating to the Municipalities in the mofussil, namely, the Madras District Municipalities Act which contains similar provisions regarding property tax, originally the rule relating to the effect of an amendment of the valuation of a property ran thus:

"*Rule* 15:—When the chairman has amended the assessment books of his own motion otherwise than in the course of a general revision...... the amendment shall be deemed to have effect from the earliest date on which the circumstances justifying the amendment existed in the year to which the orders have reference".

Rule 8 conferred the power on the chairman to amend at any time the assessment books by inserting therein or removing therefrom any property or by altering the amount of tax. In the *Municipal Council of Kumbakonam* v. *The South Indian Railway Company Limited.*[9], the legal impli-

---

9. (1929) 57 M.L.J. 251 : I.L.R. 52 Mad. 792 : 30 L.W. 271 : A.I.R. 1929 Mad. 849 (2).

cations of rules 8 and 15 of schedule IV, came up or consideration. In that case the Municipal Council of Kumbakonam assessed the South Indian Railway for the year 1921-22 to property tax on a certain footing. A demand notice for a certain amount was sent on 31st July, 1921 with a foot note that the demand was provisional and subject to revision under proviso (a) to section 82 (2) of the Act. This proviso did not relate to any power of revision. Such power was contained in rule 8 of schedule IV. In February, 1923 the chairman amended the tax and sent a communication to the railway company informing them of the altered assessment and also stating that the new assessment would take effect from 1st April, 1921. The question was whether the amendment made in 1923 could be made so as to operate from 1st April, 1921. Ramesam and Jackson, JJ., held that there was nothing in the Act to prevent an amendment in 1923 of an assessment made in 1921. The year to which the orders had reference (rule 15) was held to be the year 1921, the date of the original demand. But they held that because of section 345 an amendment made more than three years after the year for which it was intended to have effect was useless, and as the rules and the Act stood the amendment of an assessment could be made at any time within three years so as to operate retrospectively. It was urged before the learned Judges that inconvenience may result by such a construction as they adopted of rule 15, but they said:

"In the face of the section and the rules the inconvenience cannot prevent the operation of the Act and the rules made thereunder."

This decision was given on 18th April, 1929. In 1930 the Madras District Municipalities Act was amended by Madras Act X of 1930. There was a radical alteration in the rule relating to the amendment of the assessment. Rules 6 to 12 were substituted for the original rules. Rule 8 (2) runs thus:

"The executive authority may amend the assessment books at any time between one general revision and another by inserting therein or removing therefrom any property or by altering the valuation of any property or the amount of tax. Such amendment shall be deemed to have taken effect on the first day of the half year in which it is made:

Provided that when the amendment is made in any half year after the demand notice for that half year has been issued, it shall have effect only from the succeeding half year."

The result of the alteration has been practically to abrogate the decision in *Municipal Council of Kumbakonam* v *South Indian Railway Company, Limited*[9]. Apparently it was thought that the result held to follow from the old rule 15 by the learned Judges of this Court would lead to hardship and inconvenience and therefore a new rule was substituted which considerably restricted the retrospective effect of the amendment.

Six years later the City Municipal Act was amended. Rule 3 of schedule IV after the amendment is in *pari materia* with rule 8 (2) of schedule IV of the District Municipalities Act. As the rules stand both in the District Municipalities Act and in the City Municipal Act, no amendment of assessment books by the alteration of the valuation will have effect except in respect of the half year in which it was made and even this result would be excluded if a demand had been made for that half year. Now it must not be overlooked that section 137-A was inserted and rule 3 was introduced in schedule IV of the Act. According to well-established

9. (1929) 57 M.L.J. 251: I.L.R. 52 Mad. 792: 30 L.W. 271: A.I.R. 1929 Mad. 849 (2).

canons of statutory construction, both section 137-B and rule 3 ought to be so read as not to make one of the provisions nugatory. It is not permissible to ascribe to the Legislature an intention on the one hand to restrict the retrospective operation of an alteration of valuation by rule 3 to the half year in which the amendment is made and at the same time to attribute to it an intention to give retrospective effect to such an alteration extending to three years. It may be said that rule 3 deals with both adding to and removing from the assessment books and altering the valuation either by increase or by decrease. This may be so, but from the point of view of the tax payer, it is only when there is an increase in valuation that a retrospective operation causes hardship. To begin with, therefore, section 137-B should not be read so as to override rule 3. There is also another aspect of the circumstance *i.e.*, the insertion of both section 137-B and rule 3 by the enactment. If under section 137-B there can be an amendment which becomes effective from three years past why is it necessary to provide in rule 3 that the amendment shall be deemed to take effect on the first day of the half year in which it is made. The larger power would obviously include the much lesser power.

Let us look at the language of section 137-B. Is there anything in it which enables the Corporation to obtain any relief when a property has been under-assessed by imposing an additional assessment at any time within three years from the date on which such person may be said to have been under assessed. We think not. The section only provides that if any person liable to pay any tax, leviable under that chapter has escaped assessment in any half year or year, the Commissioner may serve on such person a notice assessing him to the tax due and demanding payment thereof. There is no mention there of increase of tax already assessed. A person should have been liable to pay a tax and that person should have escaped being assessed to that tax. Then the Corporation can within three years from the date on which the person should have been assessed, assess him to that tax which he was liable to pay but which was not levied on him. In this case the appellant was no doubt liable to pay the property tax in respect of the building owned by it. But it has not escaped assessment of that tax. So, there can be no question of the Corporation assessing the appellant to that tax. On the plain meaning of the words of the section, it does not appear to contemplate the case of an escape by the tax payer, from what may be considered subsequently as the proper assessment of any tax. The section would obviously apply to a case where a person was liable to pay the profession tax for a particular half year but the tax was not imposed on and collected from him. It would also apply to a case where a person has escaped liability. It may possibly apply to the case of the property tax as well. It may be said that, if a person was the owner of a building within the area of the Municipality in a particular half year, but the property tax in respect of that building had not been levied on and collected from him, he has escaped assessment of the property tax in respect of it. But in the case of a building the annual value of which is found entered in the assessment books the postition is entirely different. An assessment once made shall continue in force until it is revised and until the revised assessment takes place; so says rule I-E of schedule IV. The only provision which fixes the time from which a revised assessment takes effect, when the revision is not general, is rule 3 and under that rule the amendment will take effect only from the first day of the half year in which it is made and if a demand has been made it would have

effect only from the succeeding half year. Till an enhancement of valuation is made and it duly takes effect from a particular time, it cannot be said that a person has been under-assessed in respect of the property when a tax has been levied on him calculated on the assessment found in the assessment books and which must be deemed to continue in force until revised assessment takes effect. It should not be overlooked that section 137-B by itself does not give the power to the corporation to amend the valuation of the property for the purpose of imposing the property tax to which he was liable but which he has escaped from paying. If the procedure under rules 3 and 2-A is not resorted to then the entries in the assessment books will continue to be in force and the property tax will have to be calculated only on the valuation contained in the books. If a person has paid that amount of tax, then one fails to see how he has escaped assessment even partially, assuming that the section applies to the case of a partial escape. Even in the case of profession tax though a person who was liable to that tax but has escaped from paying he may under section 137-B be compelled to pay it, yet if he has already paid the tax on a particular scale as demanded by the council during a half-year, he cannot under section 137-B be made liable to pay an enhanced tax on a higher scale for the same half year. This is because the person has not escaped assessment to profession tax.

It is not difficult to explain why section 137-B made liable to pay an enhanced tax on a higher scale for the same half year. This is because the person has not escaped assessment of the profession tax.

It is not difficult to explain why section 137-B was introduced into the Act. It was evidently to get over the difficulty pointed out in the decision in *Prince of Arcot v. Corporation of Madras*[10]. In that case the learned judges held that under the provisions of the City Municipal Act and the rules made thereunder profession tax becomes 'due' by a person liable to pay it only after he has been assessed to a particular amount by the Commissioner. Such assessment must be made in each respective half year, and hence, profession tax for any half year prior to the current half year cannot be levied unless it had been assessed in that half year. Now under section 137-B such assessment though it had not been made in that half year can be made and levied subsequently within a period of three years from the date on which the person should have been assessed. In *Saraweswara Rao v. Umamaheswara Rao*[11] Wadsworth, J, observes as follows with reference to this section:

"It seems to us that this provision was obviously intended to make the machinery for the levy of the tax applicable to a retrospective assessment and to meet any possible objection which might be raised owing to the delay in making the assessment. The whole of section 137-B was apparently drafted to meet the situation created by the decision in *Prince of Arcot v. Corporation of Madras*[10].

Applying it to the case of property tax if there has been a delay in the assessment of the property tax in any year then the Corporation can even after the lapse of the year proceed to make the assessment.

The general principle is well settled in Dillon on Corporations Volume IV, at page 2440 thus:

"The Legislature may, unless restricted or controlled by constitutional provisions authorise a municipality to levy and collect retrospective taxes upon property which was subject to taxation in past

10. 30 L.W. 261: (1929) 57 M.L.J. 536: I.L.R. 52 Mad. 866: A.I.R. 1930 Mad. 200.

11. (1940) 2 M.L.J. 841: I.L.R 1941 Mad. 383: 52 L.W. 765: A.I.R. 1941 Mad. 152.

years, but which has escaped taxation through omission from the assessment roll or otherwise.

The Legislature has also authority to revalue and re-assess the property which in preceding years has been grossly undervalued; a gross under-valuation of property is within the principle applicable to an entire omission of property".

The remarks in the note to this statement have a direct bearing on the present case. A statute which authorises the assessment of property omitted in previous years does not authorise increase in the valuation of property which was assessed in previous years. Thus where the plaintiff's credits were assessed and tax paid thereon, an assessor cannot in a subsequent year impose an additional assessment upon the credits for the past year on the ground that during a previous year an assessment thereon may be imposed under the statute. Under-valuation of taxable property through mere error does not authorise re-assessment if taxes have been levied and paid.

Section 137-B speaks of escaped assessment. Escape' when used with reference to liability imports the idea of the existence of the liability. You cannot escape from a thing unless the thing exists. Now if the property tax calculated on the valuation in force in a particular half year is demanded and paid, it cannot be said that there has been an escape from a higher assessment, because for that higher assessment the power under section 137-B cannot be exercised. For altering the valuation, the Corporation must go to the provisions of rules 3 and 3-A, schedule IV. Those rules clearly fix the limit of retrospective operation. The opening words of section 137-B:

"Notwithstanding anything to the contrary contained in this Act or the rules made thereunder" do not themselves help the Corporation in the circumstances. I find that this view was also taken by Horwill J., in C.C.C. Appeal No. 53 of 1949.

My answer to the question is that the operation of section 137-B is confined to cases of complete escape of assessment and does not extend to cases where there has already been an assessment but at a lesser amount than what is proper.

Viswanatha Sastri, J.: I have had the advantage of reading the judgment of my lord, and I am, in respectful agreement with him. In view of the importance of the question debated, I add a few words of my own. The crucial question is what is the meaning of the words 'escaped assessment' in section 137-B of the Madras City Municipal Council Act. This section was enacted in order to get over the decision of this Court in *Prince of Arcot* v. *Corporation of Madras*[12], invalidating retrospective assessments to profession tax. But it does not extend to property tax. Section 137-B is comprehensive and applies to 'any of the taxes or fees leviable under this Chapter', which are enumerated in section 98 'property tax' heading the list.

It is argued for the rate-payer that, according to the scheme of the Act, property tax is levied only on lands and buildings not on 'persons' and therefore section and 137-B does not apply to the levy of property tax. Reference is made to sections 99, 100, 102, 104 and 106 (4) and rules 1, 3-A and 4 of the Taxation Rules, in which tax is not 'assessed on persons' but only on lands and buildings within the City. I am unable to accept this contention. The expression 'assessment' used in the Income-tax Act has been variously interpreted as having reference to the subject of taxation, the ground of liability, the computation of income, the levy of tax and indeed the whole procedure laid down in the

12. (1929) 57 M.L.J. 536: I.L.R. 52 Mad. 866: 30 L.W. 261: A.I.R. 1930 Mad. 200.

Income-tax Act for imposing liability on the tax payer. The meaning depends on the context in which the expression occurs. Similarly the word 'assessment', as used in the enacting part of the City Municipal Act and the Rules framed thereunder, varies in its connotation according to the context as explained by my lord. It is, in my opinion, erroneous to proceed on any theory that property tax is levied on 'lands and buildings only and not on persons and thereby seek to exclude the operation of section 137-B on that basis. It is the owner and in some cases the previous owner and in others the occupier, that is liable to pay the 'property tax' under the Act. This is in a sense a tax on persons' though it is based on the annual value of the property and is further secured by a statutory charge on the property in order to avoid loss of revenue to the Corporation.

The further question is whether there can be a retrospective assessment of property tax under section 137-B unhampered by the limitations imposed by rule 3 part I-A of schedule IV of the Act. Dr. John for the Corporation lays stress on the opening words of section 137-B which runs as follows:

"Notwithstanding anything contained to the contrary in this Act or the rules made thereunder, if for any reason any person liable to pay any of the taxes or fees leviable under this Act has escaped assessment in any half year or year etc..

He also relies on decisions interpreting section 34 of the Income-tax Act as justifying the back assessment that has been sought to be made in this case.

What then is the effect of section 137-B of the City Municipal Act? This section should not be read *in vacuo* but must be interpreted and applied with due regard to the rules in Part I-A of schedule IV of the Act. A conflict between the enacting part and the rules should be avoided if possible. Under rules 1-C and 1-D the Commissioner is required to keep assessment books with the prescribed particulars among which are included the description and name of each item of land or building in the city, its annual value and the amount of tax payable thereon. Rule 1-E provides that an assessment once made shall continue in force until it is revised and the revised assessment takes effect. The revision contemplated is obviously in accordance with the procedure prescribed by rule 3. This rule allows an amendment of the property tax assessment books between one general revision and another by altering the valuation of any property or the amount of tax payable but provides that the amended assessment shall take effect from the first day of the half year, if a notice of demand had been issued before the amendment. During the relevant period there was no revision of assessment under rule 3 in the present case. This is not a case where a property liable to tax has not come within the notice of the revenue authorities of the Corporation at all. Nor is it a case where the property has been inadvertently omitted from the assessment books. Nor is it a case where the amount of tax has, by inadvertence, been entered at a lower figure in the assessment books. Nor is it a case of a new building emerging into existence and not caught within the net of taxation for a year or two. In such cases section 137-B might apply and a retrospective assessment to property tax according to the terms of that section might be permissible. But it is not, in my opinion, a legitimate construction of section 137-B to hold that it allows a retrospective enhancement of property tax for 3 years even in cases where the tax has been levied and collected according to the rules above referred to and in strict conformity therewith, merely because the revenue authority of the Corporation, three years

after the tax had been levied and collected according to the rules above referred to and in strict conformity therewith, is of the opinion that the annual value could or should have been entered at a higher figure in its own assessment books during the previous period. The assessee in this case has not eluded the notice of the revenue authority. He was caught in the net of taxation. He was assessed to property tax and assessed to the full amount of the tax payable in accordance with the statutory rules in force at the time. Three years thereafter the revenue authority happens to entertain the opinion that the annual value might have been fixed at a higher value than that entered in the assessment books of the previous period. Can it be said that in such a case the assessee has 'escaped assessment' during the previous period within the meaning of section 137-B? I think not. There can be an 'escape' only from an existing burden or liability imposed by law. There was no such burden or liability or escapement of assessment in this case.

Then by section 55 of the Madras City Municipal (Amendment) Act, 1961 (LVI of 1961), the words 'or has been assessed in any half year or year at a rate lower than the rate at which he is assessable; or, in the case of property tax, has not been duly assessed in any half year or year consequent on the building or land concerned having escaped proper determination of its annual value' been introduced.

The amendment of this power to the Commissioner is to assess not only in the cases of complete escape 'but also of partial escape' and rectify the defect.

There is another decision by Justice K. Srinivasan in *Smt. Nafisa Zaharen Begum* v. *The Corporation of Madras*[13-14], in which it was ruled that relevant notices under Part I-A of schedule IV should be issued and complied with, then and then only the Commissioner can invoke the powers under section 137-B for the realisation of the tax.

But with great respect to this decision, it is submitted that careful consideration should be given to construction of section 137-B of the Act. The section starts with these words, 'notwithstanding anything to the contrary contained in this Act or the Rules made thereunder'. It never says subject to. The difference between "notwithstanding to the contrary" and "subject to" should be noted. We can read the section now as 'notwithstanding rule 3 Part I-A of schedule IV to the contrary contained in this Act or the Rules thereunder. Therefore, there is no necessity for complying with rules under part I-A of schedule IV to invoke powers under section 137-B.

Therefore, to sum up the discussion *supra*, the following points are to be borne in mind.

1. Before the insertion of section 137-B, the ruling in *Prince of Arcot* v. *Corporation of Madras*[15], was good law.

(2) Thereafter only in cases of complete escape, section 137-B is applicable *i.e.*, with retrospective effect by virtue of the Division Bench decision in *The Bombay Life Assurance Corporation Ltd., by its Agents S.A. Rangaswami & Brothers* v. *Corporation of Madras.*[16]

(3) Section 137-B will be applicable not only to cases of complete escape but also to cases of partial escape

(4) Section 137-B may be brought into play even without resorting to rule 3 of part I (*a*) of schedule IV if proper construction of the section is made.

13-14. (1965) 2 M.L.J. 157 : 78 L.W. 269 A.I.R. 1965 Mad. 515.

15. (1929) 57 M.L.J. 536 : I.L.R. 52 Mad. 866 : A.I.R. 1930 Mad. 200.

16. (1951) 1 M.L.J. 220 : I.L.R. (1951) Mad. 907: 64 L.W. 229: A.I.R. 1951 Mad. 725.

SUPERIOR COUNCIL OF THE JUDICIARY

By

DR. JOSEPH MINATTUR, *Barrister-at-Law.*

Of late the name Superior Council of the Judiciary has become familiar to the reading public in India, mainly because an institution under that name has been recommended for adoption in "Some Suggestions for Constitutional reform" widely circulated during the past few months. Though the paternity of these suggestions is still a matter of opinion, it is generally believed they had the blessings of the elite in the ruling party.

The Superior Council of the Judiciary envisaged in the *suggestions* consists of the President of the Republic as Chairman, the Minister of Law and Justice as well as the Chief Justice of the Supreme Court as Vice-Chairmen, two other judges of the Supreme Court, two Chief Justices of High Courts, four persons nominated by the President and four persons elected by Parliament. The Council is to be entrusted with all administrative matters relating to the judiciary. The Council or its Committee formed for the purpose will be given authority to interpret the Constitution and all other laws as also to determine the constitutional validity of any legislation. As the decision made by the Council or its Committee shall "be final and binding on all Courts", the jurisdiction in such matters which now vests in the superior Courts will be "automatically taken away". Further the Superior Council or its Committee appointed for the purpose will be empowered to review the conduct of the Judges of the Supreme Court and the High Courts and may recommend to the President removal or even dismissal of any of the Judges. It may act upon complaints received against the Judges or may make inquiries on its own initiative. The Council or its Committee will 'ensure the discipline of these Judges, their independence and the administration of the Courts'.[1] The President of the Republic as Chairman of the Superior Council of the Judiciary will have power to punish for contempt of himself. It may also be mentioned that the President contemplated in the *suggestions* will be elected directly by the 'tens of millions of voters' in India and will enjoy all the powers exercised by the President of the United States of America and all those exercised now by the Union Cabinet in India. "The President may, however, consult the Council of Ministers (who are responsible to them) in such matters and in such manner as he may deem fit".

From the large number of articles quoted from the Constitution of France, it may be assumed that the inspiration for the proponents of the *suggestions* was in the main, from that Constitution. It is, however, strange that the quotations are from the Constitution of the Fourth Republic under which the President was not much more than a figurehead [1-a]. The President under the Fifth Republic is vested with much greater powers, though it is hard to say that the De Gaulle Constitution envisages a purely presidential system of Government. Article 20 of the Constitution of the Fifth Republic states : "The Government is responsible to Parliament."

Maurice Duverger, an eminent legal scholar of France has written that the 1958 Constitution has "provided a novel combination of quasi-presidential and traditional Parliamentary Government.[2]

---

1. This is quoted in the *Suggestions* from Article 84 of the Constitution of the Fourth French Republic.

1-a. *See* Mawrice Duverger, *The French Political System* (Chicago, 1958), pp. 40-41.

2. In an Article in *Le Monde*, 26th November, 1969, quoted in Dorothy Pickles, The *Government and Politics of France*, (1972), page 29.

Pompidou himself has stated: Our Constitution is half way between a properly presidential regime and a properly parliamentary regime. The balance between the two........has the advantage of making our political system capable of firmness, stability and at the same time of flexibility[3].

Dorothy Pickles, an astute observer of the French political scene in recent years has also stated that the Constitution of the Fifth Republic "provides for a democratic and parliamentary system of Government......The Prime Minister appoints and dismisses his colleagues and is responsible to Parliament (in practice to the National Assembly only.)"[4].

It would therefore be unfair to blame the de Gaulle Constitution for having supposedly inspired the proponents of the proposal for setting up a presidential regime in India[5], which, as far as exercise of powers is concerned, will have a perfect combination of the powers of the U.S. President with those of the Union Cabinet. It may also be recalled in this connection that these proponents indulge in a profusion of excerpts not from the Constitution of the Fifth Republic, but from that of the Fourth Republic. We are, however, more concerned with the Superior Council of the Judiciary in this brief note than with the presidential form of Government envisaged in the *suggestions.*

II

The Constitution of the Fourth Republic provided for the establishment of a Superior Council of the Judiciary entrusted with the task, among others, of making binding recommendations to the President of the Republic in regard to the appointment of judges. It was intended "to safeguard judicial independence."[6] Under the Constitution of the Fifth Republic, the Superior Council of the Judiciary was retained, but with its membership changed and its powers restricted in some respects, especially in regard to the preparation of annual promotion lists[7]. The Superior Council now consists of eleven members, with the President of the Republic as its ex-officio Chairman and the Minister of Justice its Vice-Chairman. It has also among its members two Judges and Advocate-General of the *cour de cassation* (Supreme Court), three Judges from other Courts, a member of the *conseild' Etat* (Council of State) and two members of the general public. Though these members are formally appointed by the President of the Republic, he must select the five Judges and the advocate-general from a list of twelve persons submitted to him by the Supreme Court and the member of the Council of State must be chosen from a list of three submitted by the Council. The Superior Council (and not the Minister of Justice) is entrusted with the task of presenting nominations for appointment of Judges of the Supreme Court and Presidents (Chief Justices) of the Courts of Appeal. It is also required to give its opinion, under

3. Press Conference of 2nd July, 1970, quoted in Dorothy Pickles, *The Government and Politics of France* (1972), page 30.

4. Dorothy Pickles, *The Fifth French Republic*, page 29.

5. *See* the Comments of Shri C. Achutha Menon in his Article "Constitutional Amendment: How and Why?" in Kalakaumudi; 26th January, 1976, pages 4-7.

The main criticism of the de Gaulle Constitution generally entered on two of its features, (i) the emergency provision in Article 16 which gave wide powers to the President during a period of crisis and (ii) the enumeration of legislative powers vested in Parliament leaving many subjects to the rule-making power of the Government, which meant not the President, but the Cabinet responsible to Parliament.

6. Peter Herzog and Martha Weser, *Civil Procedure in France* (1967), page 52.

7. A Promotion Commission (Commissioned Advancement) was established in 1958 with a view to reducing political influence in the promotion of all Judges (Magistrates).

conditions to be determined by an organic law, on proposals of the Minister of justice relative to the nomination of other Judges. The Superior Council under the fifth Republic, as under the Fourth, exercises certain disciplinary powers over judicial officers. Both these Constitutions guarantee judicial independence by stating that Judges are irremovable. This has been interpreted to mean that they cannot even be transferred, without their consent, to a similar or higher position than the one they are holding. They may, however, be transferred temporarily by the President of the Court of Appeal to a different Court in cases of urgent need; such transfer may be for two months only but it may be extended to four months with the consent of the Minister of Justice. In disciplinary proceedings against Judges the Minister of Justice, acts as the complaining party and neither he nor the President of the Republic may be present when such proceedings are conducted before the Superior Council which will on such occasions, be presided over by the President of the Supreme Court. The Judge against whom complaint has been made as well as his counsel will be entitled to examine the complete dossier (file) of the case. Further, the Judge will be entitled to be heard. In case the Superior Council finds the Judge guilty, it may decree any of the disciplinary sanctions such as censure, transfer, downgrading, retirement, and dismissal with or without pension rights. Disciplinary proceedings against Judges are, however, very rare[8].

Under the Constitution of the Italian Republic adopted in 1947, the judiciary (*magistrature*) constitutes "an order which is autonomous and independent of any other power[8-a]. In Italy the First President and the Advocate-General of the Court of Cassation (Supreme Court) are ex-officio members of the Superior Council of the Magistrature, two-thirds of the other members are elected for a period of four years by ordinary magistrates (that is judicial officers) from among the members of the various categories of the magistrature and one-third, also for a four-year period, by Parliament in joint-session from University professors of law and lawyers with fifteen years of practice. During their tenure of office, they may not be members of professional bodies or of Parliament or regional counsel. Under Article 105 of the Constitution,

in accordance with the provisions of the judicial organisation appointments, assignments and transfers, promotions and disciplinary measures against magistrates are the responsibility of the Superior Council of the magistrature.

Somalia, now called Somali Democratic Republic[9], appears to have adopted the institution from Italy. In Somalia the Superior Council of the Judiciary consisted of the President of the Supreme Court, the Attornery-General, the members of the Supreme Court and three other members who were to be elected for a period of three years by the National Assembly from among the deputies or practising lawyers. The Council was to exercise supervision through the President of the Supreme Court over the functioning of the Courts as well as over the members of the judiciary and auxiliary personnel. It also exercised supervision over competitive examinations in respect of the members of the judiciary; it conducted disciplinary proceedings against members of the judiciary and auxiliary personnel and made binding recommendations on the penalties to be imposed. Perhaps its most significant task

8. Peter Herzog and Martha Weser, *op. cit.*, page 131.

8-a. Italian Constitution, article 104.

9. For further details, *See* Haji N.A. Noor Muhammed, *The Legal System of the Somali Democratic Republic* (Virginia, 1972).

was to advise the Minister of Justice regarding administrative matters concerning members of the judiciary. Its recommendations were binding in regard to appointments, transfers, promotions and termination of appointments.

An institution of this kind is not unknown in common law countries. Under the Nigeria (Constitution) Order in Council, 1960, Nigeria adopted an institution known as Judicial Service Commission. All the Judges of the Federal Supreme Court with the exception of the Chief Justice[10] were to be appointed on the advice of the Federal Judicial Service Commission which consisted of the Federal Chief Justice, the regional Chief Justices and the Chief Justice of Lagos, the Chairman of the Federal Public Service Commission and a present or past superior Court Judge in some part of the Commonwealth, appointed by the Governor-General on the advice of the Prime Minister. There were similar judicial service commissions in the regions with the regional Chief Justice as Chairman, and a Judge of the regional High Court designated by the regional Governor acting on the advice of the Premier, a present or past Superior Court Judge in some part of the Commonwealth, appointed by the Governor on the advice of the regional Premier and the Chairman of the regional Public Service Commission as members. The Commission of the Northern Region had the Grand Kadi also included in its membership. About the establishment of these commissions, a commentator has written :

The motivation for setting up these bodies was not only to wrest appointments of Judges from the hands of the Executive but also one believes, to leave appointments of Judges in the hands of their peers[11].

III

It may be observed that in none of the countries we have mentioned in relation to the existence of a higher judiciary Council is provision made for judicial review of legislation by the Council. The Council in all these instances is intended to ensure the independence of the judiciary by entrusting it with the task of recommending persons for judicial appointments as well as vesting in it powers to take disciplinary proceedings against refractory Judges. If powers of appointment and promotion of Judges of Superior Courts are taken away from the executive branch of the Government and entrusted to their own peers, it is bound to create in the members of the judiciary a sense of independence and a reasonable degree of inhibition of any possible incentive to toe the executive line.

The fact that the Superior Council of the judiciary in other countries is not asked to review parliamentary legislation is no reason why such a task should not be contemplated for the council in India, in addition to its work of making binding recommendations for judicial appointments and decreeing disciplinary sanctions against Judges. Whether the Council could be entrusted with judicial review will depend, in the main, on its composition. If it consists of legislators they are being asked to be Judges in their own cause as they were party to the adoption of the law which is under scrutiny. If it is to be manned by the nominees of the executive, they are likely to be biassed in favour of the piece of legislation, especially in a parliamentary regime, as these the executive and the virtual legislator, are not different.

---

10. The Federal Chief Justice and the Chief Justice of Lagos were to be appointed by the Governor-General on the advice of the Prime Minister. Similarly regional Chief Justice were appointed by the regional Governors on the advice of the regional Premiers.

11. Abiola Ojo, "Judicial Administration in Nigeria" *Punjab University Law Review* (1972 & 73), page 30.

In France, the Constitution of 1958 provided for a Constitutional Council, modelled on the virtually ineffective Constitutional Committee of the 1946 Constitution, but greatly modified. The Council consisting of all ex-presidents of the Republicand nine members of whom three are appointed by the President of the Republic and three each by the President of the two Houses of the Legislature,is entrustedwith a variety of duties, some of an advisory character, as for instance, when it is consulted if the President of the Republic contemplates assumption of emergency powers. It also supervises the regularity of elections of the President of the Republic and members of Parliament. It controls the constitutionality of legislative acts, as it is empowered to declare un-constitutional newly enacted organic laws[12] and rules of procedure adopted by either House of the Legislature. These are to be submitted to the scrutiny of the Council before their promulgation or before they are put into operation. Ordinary laws as well as international agreements may be referred to it by the President of the Republic, by the Prime Minister or by the Presidents of the two houses of Parliament before their promulgation or ratification. If declared unconstitutional a statute may not be promulgated, a treaty may not be ratified and a rule of procedure may not be put into operation. Normally the Council hands down a decision within a month, but in cases of urgency, it is required to give a decision within eight days. The Council does not deal with a statut once it has been promulgated.

Italy, like the Federal Republic of Germany, has a Constitutional Court, consisting of fifteen distinguished personages; all of them are practising lawyers of long experience, experienced Judges or professors of law.[13] The Court is the ultimate interpreter of the Constitution and is empowered to declare both national and regional laws unconstitutional[14]. Perhaps it is much more interesting to look at a Constitutional Court which functions close by in terms of geography, and may perhaps provide us with a model for emulation. The Constitition of Sri Lanka adopted in 1972 has provided for a Constitutional Court consisting of five members to be appointed by the President of the Republic. When any question as to the constitutional validity of a provision in a Bill introduced in Parliament is referred to the Constitutional Court for its decision by the Speaker or when he is unable, by the Deputy Speaker of the National State Assembly, three members chosen according to the rules of the Court, will determine the matter. The Attorney General, the leader in the Assembly of a recognised political party or a sufficient number of members of the Assembly as would constitute a quorum of the Assembly by a written notice signed by them may request the Speaker to make such a reference to the Constitutional Court. The Speaker himself and if, he is unable, the Deputy Speaker may on his own initiative, refer the question to the Court. The Court itself on being moved by any citizen may advise the Speaker that there is a question of constitutional validity in a Bill, so that he may refer it to the Court for its decision.

The Court is required to give its reasoned decision within two weeks of the reference. But when a Bill is considered by the Cabinet of Ministers to be urgent in the national interest the Court is expected to hand down its decision within twenty-four hours of the assembling of the Court. A dissentient member of the Court may

12. Laws which deal with the organisation of the Government and which require a qualified majority; *see* Article 46 of the Constitution of 1958.

13. Peter Herzog and Martha Weser, *op. cit.* pages 118-119.

14. For some details, *see* Henry, J. Abraham, *The Judicial Process* (Third Edition, 1975), pages 301-302.

state his reasons for his dissent and these will also be forwarded along with the decision of the majority. The Attorney General is entitled to be heard on all matters before the Constitutional Court. The Court may in its discretion grant a hearing to any person before dealing with the question referred to it. It may not, however, permit a member of the National State Assembly to appear before it as an advocate or proctor. It may summon and hear witnesses and order the production of any document or other thing. If the Constitutional Court advises the Speaker that the Bill referred to it or a provision in the Bill is inconsistent with the Constitution or if it entertains a doubt about its consistency with the Constitution the Bill will not pass into law except with the special majority required for amending the Constitution[15]. "No institution administering justice, and likewise no other institution, person or authority shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question a decision of the Constitutional Court."[16]

It seems there is much to be said in favour of judicial review whatever be its form, before the promulgation of a statute, for not conducting regular adversary proceedings when deciding the constitutional validity of a piece of legislation and also for handing down a single opinion by the Court which may be taken to be unanimous, if dissenting views, if any, are not made known to the public. Perhaps this is not the occasion to dwell upon these points.

Whether a Superior Council of the Judiciary is here established or not and whether, when established it is entrusted with the task of judicial review of legislation or not, it is essential, if maintenance of judicial independence in the Indian context is desired, that the powers of appointment, transfer, promotion etc. of the members of the higher judiciary, if not of the entire judiciary, are left in the hands of an independent and impartial body of persons, preferably their own peers, to the total exclusion of the executive whose concepts of right and merit may be basically politically-oriented.

15. Constitution of Sri Lanka, Article 55 (4).
16. *Ibid.* Article 54 (4).

PURCHASE BY COMPANY OF SHARES OF OTHER COMPANIES: SCOPE OF SECTION 372 (2): MEANING OF "SUBSCRIBED CAPITAL."

By

G. V. NARAHARI RAO, M.A., B.L., A.C.S.

Section 372 of the Companies Act puts some restrictions on the "investing" company before it invests its moneys in acquiring the shares of any other body corporate. which has been called by the Company Law Board as the "investee" company. The restrictions are based on certain percentages of the "subscribed capital" of the investing company as well as the "investee" company, and both the categories of restrictions have to be honoured by the investing company. On the question of the computation of the "subscribed capital" for this purpose, there seems to be a want of proper understanding.

To understand the position in a true perspective, the relevant sub-sections (1) and (2) of section 372 must be before us. They read:

"372. (1) A company (hereafter in this section and section 373 referred to as the investing company) shall not be entitled to subscribe for, or purchase (whether by itself, or by any individual or association of individuals in trust for it or for its benefit or on its account) the shares of any other body corporate except to the extent and except in accordance with the restrictions and conditions specified in this section.

(2) The Board of Directors of the investing company shall be entitled to invest in any shares of any other body corporate upto ten per cent. of the subsscribed capital of such other body corporate:

Provided that the aggregate of the investments so made by the Board in all other bodies corporate shall not exceed thirty per cent of the subscribed capital of the investing company:

Provided further that the aggregate of the investments made in all other bodies corporate in the same group shall not exceed twenty per cent of the subscribed capital of the investing company."

And by a communication, No. 48 (50), C. L. IV of 1961, dated 12th February, 1962, the Company Law Board has given a number of clarifications about section 372 for the guidance of all concerned. But it is sufficient here to quote only the following clarification:

C. L. B's. clarification.

"For purposes of calculating the prescribed limit of 20 per cent. or 30 per cent. of the subscribed capital of the investing company, the actual cost of the investments (and not the nominal value of the shares **to be purchased or subscribed**) is to be taken into account; the limit of 10 per cent. of the subscribed capital of the "investee" company is, however, to be computed on the basis of the full nominal value of the shares of that company **proposed to be purchased or subscribed.**"

The scope of the above clarification too appears to be not well comprehended by some members of the audit profession and even lawyers, because of their failure to note the basic and more comprehensive meaning of "subscribed capital".

Let us take a concrete case for illustration. The investing company **A** has a subscribed capital of Rs. 200 lakhs. So, according to sub-section (2), it can invest in the aggregate for shares in other bodies of the same group upto 20 per cent. of Rs. 200 lakhs **i.e.,** Rs. 40 lakhs, or upto 30 per cent. **i.e.,** Rs. 60 lakhs in the aggregate in other bodies corporate including the bodies corporate in the same group.

According to the first para of the Company Law Board's clarification (supra) if the investee company, say 'X' belongs to the same group as **A**, then the investment by **A** in company **X** should not exceed Rs. 40 lakhs when

computed with reference to A's subscribed capital. According to the words within brackets in the above clarification of the Company Law Board, this Rs. 40 lakhs should be the **actual cost** of the investment including the premium, if any, payable on the cost of acquiring the shares of **X** company. Suppose the **nominal value** of an equity share of **X** company is Rs. 10 and its subscribed capital (actual or proposed to be subscribed) is Rs. 600 lakhs. Then, normally for Rs. 40 lakhs, 4,00,000 equity shares of company **X** could be acquired by **A** company. But if a premium of Re. 1 per share has to be paid on every Rs. 10 per equity share, then for Rs. 40 lakhs only 3,63,636 equity shares of of Rs. 10 each of company **X** could be acquired by **A** company. Anyway, for our purpose, even in this first part of the clarification of the Company Law Board, it is to be noticed that the words "to be" "to be purchased or subscribed" are significant. They mean without doubt that the purchase or subscription is yet to be completed or it is only a proposal at the moment, without any money having been paid on the shares.

Second Part.

The second part of the clarification, however, says that when observing the restriction with regard to the subscribed capital of the "investee" company **X**, it is **not the actual cost** of sale by **X** company at Rs. 11 per equity share of face value of Rs. 10 that is to be taken into account but **only the nominal value of** Rs. 10 per share at which the company **A** will purchase the shares of **X** company. Here again we find the words "**Proposed** to be purchased or subscribed" instead of merely "purchased or subscribed." It obviously means again in the context of section 372 (2) that in calculating the 10 per cent. of the "subscribed capital" of **X** company, the total amount of the proposed subscribed capital of company **X** has to be taken into account, not necessarily what has already been standing in the books of **X** company as subscribed capital.

There is a difference between the first and second parts of the clarification (supra), but that difference relates only as to whether the actual cost or the nominal cost of the acquisition has to be taken into account. But it has been clearly stated in both the parts that the "subscribed capital" of the investee company will include what is **proposed to be subscribed** as capital of the investee company.

Even this clarification by the Company Law Board does not appear to have been properly understood or appreciated in the manner explained above.

Take a concrete case of company **B,** as an investee company (hereinafter referred to as the instant case). If its subscribed capital (proposed) is Rs. 300 lakhs, then company **A** (supra) could invest, that is, purchase or subscribe, upto Rs. 30 lakhs (nominal value) of the shares of company **B,** but it cannot invest upto Rs. 40 lakhs or Rs. 60 lakhs on the basis of the 20 per cent. and 30 per cent. of its own already subscribed capital (actual) as we have seen supra. Company **B** is a new company whose issued and subscribed capital of Rs. 300 lakhs has been sanctioned by the Controller of Capital Issues and the Government of India also has sanctioned the "scheme of finance", which included this Rs. 300 lakhs as issued and subscribed capital, before the company was given an industrial licence for its project. A foreign collaboration has also been approved by the government and this agreement provides for the participation (subscription) by the foreign collaborator to the extent of Rs. 75 lakhs in the Issued and Subscribed Capital of company **B.** The promoters, their friends and associates have agreed to subscribe for Rs. 60 lakhs and for the balance of the Issued Capital **viz.,** Rs. 165 lakhs, company **B** has made agreements with financial institutions and banks and others for underwriting this entire amount. The arrangement as above has been approved by the government, the Controller of Capital Issues and the financial institutions too, some of which, in addition to underwriting the shares have also agreed to lend some term loans for the company for implementa-

tion of its project. Rs. 300 lakhs is to be the issued capital and it is the same for the **proposed** subscribed capital.

Among the promoters, company **A** is one and it has agreed to subscribe for the shares of **B** company only for Rs. 20 lakhs, though it could subscribe upto Rs. 30 lakhs (see supra). The other promoters will be (as agreed) subscribing for Rs. 40 lakhs, so that the aggregate of all the Promoters' subscriptions would be Rs. 60 lakhs.

Promoters begin.

Company **B** starts its collection of share subscriptions from the promoters. Company **A** starts first to subscribe. Obviously there is no subscribed capital already existing in company **B** when company **A** makes its application for subscribing for **B** company's shares. Therefore, if sub-section (2) of section 372 is strictly followed, company **A** cannot calculate on the basis of a zero subscribed capital of company **B**. Only if the clarification of the Company Law Board (2nd part) is followed, **A** could make any investment at all at the moment in company **B**. Accordingly it applies for Rs. 20 lakhs worth of shares with an accompanying payment of 25% (or Rs. 5 lakhs) as application money. The question is whether company **A** has exceeded the limit set in section 372 (2) even technically, according to an opinion seriously put forward

Or suppose, company **A** does not begin, but other promoters make their subscriptions. If the other promoters too are other bodies corporate **C, D, E** and **F** each of which has agreed to subscribe (or invest) for Rs. 10 lakhs in the shares of company **B**, so that **A, C, D, E** and **F** would in the aggregate contribute for Rs. 60 lakhs as agreed, then none of the 5 bodies corporate can make any beginning of their investments at all before any other, as there would be no existing "subscribed capital" (actual) of company **B** on which the 10 per cent. has to be reckoned. When **C, D, E** and **F** subscribe (in the first instance) for Rs. 10 lakhs in **B's** "Subscribed Capital", each of them would have exceeded the 10 per cent. limit because there would have been no "subscribed capital" at all. How are the promoters' obligations to be fulfilled and how is **B** to collect these promised shares from the Promoters? The more comprehensive definition of "subscribed capital" and|or the clarification of the Company Law Board is the only recourse to help all concerned to get out of the dilemma or difficulty.

Suppose instead of all the Promoters being bodies corporate there are some individuals also among them. Suppose individuals have promised Rs. 15 lakhs in the aggregate. Company **A** has agreed for Rs. 20 lakhs, Company **C** for Rs. 10 lakhs, company **D, E** and **F** each for Rs. 5 lakhs. Assuming that all the individuals have subscribed, the subscribed capital of **B** would then be Rs. 15 lakhs. 10% of it would be Rs. 1.5 lakhs. So, at that stage, none of the companies **A, C, D** and **E** could subscribe for more than Rs. 1.5 lakhs each if "subscribed capital" meant only the actual subscribed capital and not also capital proposed to be subscribed.

If **A, C, D, E** and **F** each subscribed for Rs. 1.5 lakhs (all at the same time) then there would be a total of Rs. 22.5 lakhs (Rs. 15 lakhs Rs. 7.5 lakhs). Thereafter each of them could again subscribe for further Rs. 75,000 all at the same time again so that each raises its subscription to Rs. 2.25 lakhs. In this or like manner, only by stages could they contribute more and more towards the promised subscription. Is this what section 372 (2) means? That is where the clarification will come in to serve the need.

Subscription incomplete.

Supposing that the individuals and bodies corporate (excepting company **A** for Rs. 20 lakhs) have completed their subscription for Rs. 40 lakhs. Even at that stage company **A** could subscribe for 10% of Rs. 40 lakhs **i.e.,** Rs. 4 lakhs but not for Rs. 20 lakhs, if "subscribed capital" meant only actual subscribed capital. Assuming also that the foreign collaborators have also subscribed for the promised Rs. 75 lakhs (in the instant

case) and paid at least the application money, therefor, before A subscribes, only Rs. 115 lakhs (40 + 75) would have been subscribed and **A** could then subscribe for 10 per cent. of Rs. 115 lakhs or Rs. 11.50 lakhs, but not upto Rs. 20 lakhs. After it has subscribed this first instalment of Rs. 11.50 lakhs the aggregate would be a subscribed capital of Rs. 126.5 lokhs. Then **A** could again raise its subscription to 12.65 lakhs from Rs. 11.50 lakhs. The limit has been reached and there **A** should stop. It will yet have to subscribe for Rs. 7.5 lakhs, which it cannot do unless the public subscription also opens and at least Rs. 200 lakhs have been collected in the aggregate as actual subscribed capital.

But it is always the practice to state in the Prospectus to be issued before the public issue is made that the promoters have already subscribed and|or what the foreign collaborators have subscribed and|or what is reserved for any one and what is left of the proposed issued capital which is offered for public subscription. How could the Prospectus come out in the instant case if company **A** as one of the promoters is allowed to subscribe for only Rs. 12.75 lakhs and the balance of its intended subscription of Rs. 7.5 lakhs could not be subscribed at all before the public issue opens, all because of the reason that the actual subscribed capital as distinct from proposed or agreed to be subscribed capital is to be regarded as the basis of calculation for computing the 10% subscribed capital of the investee company?

Financial Institutions' conditions.

Another interesting feature of the instant case may also be noted. The Industrial Development Bank of India, Industrial Finance Corporation of India, Life Insurance Corporation of India, and such other financial institutions which made agreements with company **B** for the underwriting of its shares in the public issue also incorporated a clause in their agreements to the following or like effect: "**B** shall raise in a manner satisfactory to the Industrial Development Bank of India, a total equity capital of Rs. 300 lakhs of which the promoters, their friends and associates shall subscribe a minimum amount of Rs. 60 lakhs and the foreign collaborators shall subscribe for shares to the extent of Rs. 75 lakhs. Except as the Industrial Development Bank of India may agree, the share capital of Rs. 135 lakhs to be subscribed by the Indian promoters and the collaborators—as stated above—**shall be subscribed for and paid-up in full before any shares are offered to the public** and the loan from Industrial Development Bank of India becomes effective."

If the words "subscribed capital" of company **B** meant only what has actually been subscribed by the company's promoters their friends and associates and the foreign collaborator, then **A** at best could only subscribe, as we have seen supra for 10 per cent. of Rs. 115 lakhs before the public issue is opened. That is, with that subscription by **A** the aggregate subscribed capital of **B** would then be only Rs. 126.5 lakhs. At that stage **A** could subscribe upto Rs. 12.65 lakhs instead of Rs. 20 lakhs. How is **B** then to honour its obligation to the Industrial Development Bank of India and other financial institutions that **A** would have subscribed for the intended Rs. 20 lakhs, leaving alone the question of paying in full for those shares before the public issue?

It seems to me that when the financial institutions insisted upon a provision in the underwriting agreement about the promoters fully subscribing for the shares of **B** for what they had proposed to subscribe, they were well aware of the full meaning of "subscribed capital" and|or the clarification of the Company Law Board dated 12th February, 1962 that by subscribing on the basis of the proposed or ultimate subscribed capital of **B**, the investing companies would not be doing so in excess of the limit prescribed in section 372 (2). They were well aware that the promoter companies could well make their contribution to the subscribed capital at any one time as each wants to do or has agreed before

the public issue on the basis that the proposed subscribed capital of **B** would be Rs. 300 lakhs ultimately. The reservation made for allotment to collaborators is also to be included in the subscribed capital.

Plain meaning.

If we give a plain meaning to the words "proposed to be purchased or subscribed" in the Company Law Board's clarification, these words mean that out of the proposed issued (subscribed) capital the total amount that has been agreed to be subscribed under the underwriting agreements or consent letters of the financial institutions etc., is also included in the "subscribed capital" for purposes of section 372. In the instant case, such proposed subscribed capital is Rs. 300 lakhs.

It is to be noted that the Government must have well visualised the eventualities and so issued the clarification referred to, giving special meaning for "subscribed capital", not in a general way, but for the practical purposes of section 372 (2) and especially for the benefit of new companies which are "investee" companies.

Let us have a look at the clarification again. The words used are "to be purchased or subscribed" and "proposed to be purchased or subscribed". They denote something to be completed in the future by payment of a part of the subscription. If the words quoted are to mean any shares "purchased already" the words "or subscribed" are unnecessary.

It is also argued that the word 'or' in "to be purchased **or** subscribed" or "proposed to be purchased **or** subscribed" has a conjunctive sense. If that were so, the order of the words should have been different, say, "subscribed or purchased", meaning thereby that mere subscribing is not sufficient but actual purchase should have been made, that is at least application money should have been paid. But the words "purchased or subscribed" have been deliberately used in contrast to the natural order "subscribe for, or purchase" as it has been used in sub-section (1) of section 372 itself (see infra). By such use it is meant that for the purposes of section 372 (2) the Company Law Board considered that, even though there might have been no purchase completed, it is enough if at least there was a proposal for the subscription. The underwriting agreements by the financial institutions and banks are binding on them and such proposals to subscribe are sufficient to make the amount concerned to be included in the "subscribed capital" for purposes of section 372 (2). The promoters' proposals to subscribe is also for similar reasons to be included in the "subscribed capital". The collaborator's proposal to subscribe is also to be included in the subscribed capital or proposed subscribed chase."

If that were not the meaning, the clarification would have used the words "shares purchased" and nothing more, in keeping with the heading of section 372 "purchase by companies of shares, etc., of other companies", and not used the phrase "shares to be purchased or subscribed." As already indicated, the word "or" in "purchased or subscribed" has no conjunctive meaning which is also to be gathered from sub-section (1)—quoted supra. It says, "A company.......... shall not be entitled to subscribe for, or purchase the shares, etc." A comma separates "subscribe for" from "purchase."

Not only the leading financial institutions have construed and followed the clarification in the manner indicated above, a learned commentator of the Companies Act, Mr. A. Ramaiya, has also stated similarly in his book "A Guide to the Companies Act", 7th Edition p. 57 as follows: "Out of the issued capital, the total amount actually subscribed or **agreed to be subscribed** is known as the subscribed capital." This author too should have taken his authority from standard works and|or the Company Law Board's clarification of 12th February, 1962. He has stated it as a general proposition, not even in the context of section 372 (2); see **infra** for more authorities similarly.

Support is also derived from sub-section (3) in section 372 itself. It reads: "In computing at any time the percentages specified in sub-section (2) and the provisos thereto, the aggregate of the investments made by the **investing company** in other body or bodies corporate .... **upto that time** shall be taken into account." It will be noted that this (including the words "upto that time") refers only to the investing company and not the investee company. It seems to have been realised by Parliament that it is possible to take into account merely the investments already made only in the case of the investing company but not in the case of the investee company, which may be a new company just starting its collection of share capital. It is implied in sub-section (3) that only the 20 per cent. and 30 per cent. limits have to be applied or observed by the investing companies concerning their own subscribed capital **upto the time** when the proposal is made to invest in the investee company. There is no date upto which time only the subscribed capital of the investee company is to be reckoned. But, as, however, the main part of sub-section (2) will have to be observed regarding the 10 per cent. limit, the clarification became necessary to say that in the computation of this percentage the proposed subscribed capital of the investee company could be taken into account. Hence the words "purchased or subscribed" have been used. If that were not so, as we have seen a deadlock would be created and new companies cannot at all collect their shares as proposed and as approved by the Government, the Controller of Capital Issues and|or the financial institutions. It is also to be observed that in the second part of the clarification the word "proposed" is used as distinct from the word "**to be** (purchased or subscribed)" which latter denote mere futurity. There is therefore greater emphasis on the word "proposal" in the second part of the clarification.

However, it will be seen from the clarification of the Company Law Board of 12th February, 1962 that in computing the 20 per cent. or 30 per cent. limits of its subscribed capital, it is also stated that the value of the "shares to be purchased or subscribed" has to be taken into account. For example if company **P** has already a subscribed capital of Rs. 500 lakhs **at the time of its proposed investment** of say Rs. 30 lakhs in company **Q** (investee company), then sub-section (3) will apply and therefore **P** has to reckon the 20% or 30% on its already subscribed capital of Rs. 500 lakhs. But in the case of application of the 10% limit, since sub-section (3) is not applicable, if **Q** is a new company its subscribed capital (as proposed) should be at least Rs. 300 lakhs so that the investment of Rs. 30 lakhs could be made in its shares by **P** company. If **Q** is not a new company and has already some subscribed capital, say Rs. 200 lakhs and it proposes to increase its subscribed capital by another Rs. 100 lakhs, then, since sub-section (3) regarding "subscription upto that time" will not apply, it is possible for **P** company to invest upto 10 per cent. of the aggregate of the actually subscribed and proposed to be subscribed (additional) **i.e.,** 10 per cent. of Rs. 300 lahs in company **Q**, so that ultimately **P** would have invested not more than 10% of **Q**'s subscribed capital, provided, however, that thereby the limits of 20% and 30% of its own actual subscribed capital upto the moment of the investment are not transgressed.

There are also other authorities which leave no doubt that "subscribed capital" includes not only what has been actually subscribed but what has been agreed to be taken up or subscribed. See J. C. Bahl's "Secretarial Practice" 10th Edn., p. 114, where it is stated "That part of the capital which the public **agrees to take up or subscribe for,** is called the Subscribed Capital. M. J. Sethna has also defined subscribed capital as "That part of the issued capital which has been taken up or **agreed to be taken up** by the purchasers of shares of the company"—vide "Indian Company Law" 3rd Edn., p. 77. Further, in defining "Paid-up Capital" also, he says it is "The moneys which the company has received from

the shareholders in respect of the shares purchased or **agreed to be purchased** by them." These definitions are generally true for all cases. Ranking & Spicer's Company Law, 11th Edn., by Perrins & Jeffreys gives a definition of "subscribed capital" on p. 105 as follows: "The total number of shares which have been taken up, or **agreed to be taken up**, whether actually paid-up or not." It must be noted that this is also stated generally and not even in the context of investments by companies in shares of other companies. Thus it is seen that there can be no reason for any confusion at all.

WELCOME IN COURT TO THE CHIEF JUSTICE.

Welcoming the Hon'ble the Chief Justice on 8th April, 1976, Mr. S. Govind Swaminathan, the Advocate-General said:

May it please your Lordships,

My Lord the Chief Justice, today, I have very great pleasure on behalf of the Bar to welcome you as our new Chief Justice as from today. 38 years ago, you joined a gang of Advocates in Chamber No. 4. I deliberately call it a gang of Advocates because I was one of the gang. Never at that time did I, anyway, first of all, expect to last more than ten years at the Bar, and, certainly, never did I expect to be in this position when I would be welcoming you as the Chief Justice of this Honourable High Court. My Lord, after civil and criminal practice, which your Lordship had, you became the Public Prosecutor and then your Lordship was elevated to the Bench—that is the phrase we use—in the year 1960. My Lord, for the last 15 years—for which I think you deserve a medal—you have been sitting as a Judge of this Honourable High Court.

For the last 38 years, we have seen many many changes. We have seen the approach between the Bench and the Bar before Independence and we have seen the approach between the Bench and the Bar after Independence. Your Lordship may well remember that in the old days when Judges used to go on inspection to the Districts, they were forced to go in a coupe, all by themselves, and they remained more or less throughout their career as a separate breed altogether in a world of their own. We saw them in Court and we saw them nowhere else. But some of us took up tennis and so we saw them in another Court. But that was all. Today, I am sorry to say that the word 'approachability' is a dirty word in this High Court. My Lord, we, members of the Bar—who are only a family here today—occupy a very strange profession. All day long and every day, we come to this building. Only a very small percentage of us is actually on their legs arguing a case. Another small ten per cent. is waiting for the next case to reach. What is the rest doing? The rest is wandering in the corridors or staying in the various associations and we gossip. We run down Judges. We run down senior lawyers and we talk about all the various things which have happened, which is all right. There is nothing wrong in that. But, what is wrong and strange today is, what we talk about in the Association at 11 O'clock, the Judges seem to know at 4 O'clock. Now is that not strange? That is why I say that we must do something about this. I am in all seriousness. My Lord, we have really gone to the bottom. We are at the bottom. This High Court, which was once at the top has to get to the top again. My Lord, I can frankly confess that the greatest amount of blame must be thrown on the bar. We cannot get away from our responsibility there. Otherwise, why is it said today by the man in the Teynampet bus that it is very simple to get a case admitted. "Only you have to engage *X*. Very simple thing to do. 'Y' will do it. Don't worry. There is no difficulty at all". That is what is said and what is now being written in letters to Advocates. Is it something, My Lord, that we should be proud of? We should be absolutely ashamed of the way they talk about us, and it is the man in the Triplicane bus that matters. Justice must not only be done, but it must seem to be done, and, as far as the man on that bus, or the man in the street is concerned, My Lord, the respect that he has to the High Court today is absolutely nil. My Lord, that is why I have not said the usual words that you will get 'full co-operation from the Bar'. Those words are utterly meaningless. What do you mean by 'full co-operation from the Bar'? It is not bowing to the Court and saying 'Yes, My Lord' and 'No, My Lord', the whole time. That is not co-operation. My Lord, the co-operation that your Lordship must get from the Bar is that we ourselves must improve our own behaviour, stop public talking about our behaviour towards the Judges and start afresh.

When we can do that, then, your Lordship can say "At least the Bar is certainly trying to help". Adjournments can be got in Chambers today without the other side knowing anything about it. All these things have to stop. My Lord, may I confess that it is our fault, my fault and nobody else's? We are all in a family today, all the High Court consisting of Judges and Advocates, and, unless we pull ourselves and stop all the loose talk that is going on, there is absolutely no hope for us. My Lord, you will forgive me on this occasion when we should be rejoicing, I am speaking in this frame of mind. I never for one moment expected to be here when your Lordship becomes the Chief Justice. I am glad, for many reasons, I am here. I am glad we have been friends for the last 38 years. My Lord, even though we have been friends for the last 38 years, you are now a Judge of the High Court and I am an Advocate, and it has to remain like that with a line between us.

We must not have those exclusive gatherings of Judges and Advocates and, if there are to be gatherings, let them be open to all the Advocates. These exclusive gatherings have been the downfall of this Court. My Lord, as I said, if we can improve on these things from this side of the Bar, I think, your Lordship will get the full co-operation from the Bar. May I also mention just two other things? The other day, a junior member of the Bar said: When are we going to start addressing the Judges 'Mr. Judge'? I said "Do it tomorrow".

The Hon'ble the Chief Justice: You start it now.

Advocate-General: He asked me whether the Judges would object? I said "Certainly not". He asked "Why dont you start"? I said for the last 38 years I have been calling my wife by her name. Do you suddenly want to change the name of my wife? It comes naturally. That is the only reason. I have no other excuse at all. It may be a very lame excuse. When we prepare our cases and when we are thinking on our feet—some of us do not even think on our feet—when we are in that position—we having used the expression for the last 38 years or 41 years or whatever it is, we find it difficult to call our wife by a different name. That does not mean that if the younger junior wants to call your Lordship "Mr. Judge", he cannot do so. What I told him was "Don't call 'Mr. Judge' in Court, and 'My Lord' in the Chambers, because I know the Bar of this Court only too well. Don't do that."

My Lord, one more thing. There used to be the tradition of this High Court that when new Judges were sworn in, they were sworn in full Court in Court. It was not a family affair, and the entire Court should be present. You must take us into consideration. In those days the entire Court was present and the Judges were sworn in Court. I, for my part, have always thought that it was an excellent thing to do. My Lord, I do not know what your Lordship thinks about it. May I commend that to your Lordship? Everybody would like to see.

The Hon'ble the Chief Justice: We have made a start already.

Advocate-General: I always thought that it would be nice to see the Judge on the dais for the first time and to hear his voice. We like to hear him saying "Without affection or illwill". Ninety percent of us will be discussing it in the Associations later on. As I told your Lordship, we have nothing else to do. The profession is like that. We all come here to work. But we wait and, while waiting, we are talking. There is nothing wrong in that. I only hope that now that P.T.I. have gone and Reuters have also gone and Samachar being a bit slow, news to the Judges will not go so quickly as to what transpired in either of the Associations or in somebody's Chambers.

My Lord, take it from me that we are extremely happy to be here today and I only hope that, by the time your Lordship lays down office, the few of the things I mentioned, we must reform from this side first. I am not making any bones about it. It is the Bar that has spoilt the Bench and I am not saying whether the Bench allowed themselves to be spoilt or not. So, My Lord, if you

are able to see some improvement in that respect, then what I have said on behalf of the entire Bar today that you will have their full co-operation and you are getting their co-operation in every way will come true.

Replying, the Hon'ble the Chief Justice said:

Mr. Advocate-General, Brother-Judges, Members of the Bar and Friends:

I am overwhelmed by the great affection you are showing me and the great confidence reposed in me by the Advocate-General, as shown by his frank expression of his views this afternoon, though not orthodox. My endeavour will be to prove worthy of the affection and confidence he has reposed in me.

Mr. Advocate-General, your fame in making speeches, farewell speeches when the Judges retire, is well-known. It is said that it is poetic and, if it is poetic, you are entitled to flights of imagination and some inaccuracies, are justifiable. Mr. Govind Swaminathan, I am calling you that way because I literally entered into this building *via* your chambers in the year of grace 1937. From that time onwards, we have been good friends and your affection to me, a junior to you, is abounding. That explains, I suppose, the few things, which you said, and I take it, as a well-wisher and as a senior, you expect me to live up to them. On behalf of myself and my colleagues, I assure you and other members of the Bar that I will leave no stone unturned to give a good account of myself.

Well, you touched upon something, which is not very pleasant. But, certainly, it is not wrong to touch upon things, which are not pleasant, for there is no point in sweeping the rubbish down the carpet. It is better it comes out. If a man in the Triplicane bus, or some omnibus, has got a poor opinion about us, that means our stock is poor, and without going into the question whether we are really bad or not, we better avoid it. The mere fact that the people have a poor opinion itself is bad enough to condemn us and we should really take it at that and try to reform ourselves. It is natural in the history of an institution or the lifetime of a man that there are ups and downs and perhaps this institution is at a low ebb now and if it is so, with your promised co-operation and with your assurance on behalf of the Bar, I can tell you that, as a team, all of us will try to do our best.

Frankly speaking, I had my hesitations when this job came my way. But then you know full well I am a religious man. Well I said God has willed this way. In Chapter XI of Baghavad Gita, Lord Krishna to the hesitant Arjuna said "Why are you hesitating? I have already slain all your enemies. All that is needed is you stand up and fight. He used the word "நிமித்த மாத்திரம்" You do it for form's sake. I have done everything". Well, I have faith in it. That gives me courage. Again, in Chapter II, the Lord says: "Who are you to worry about the future and the results Your job is to do your work and the fruits are with me. So do not hesitate". Well, in complete trust in God, I am taking this job.

Coming down to the mundane earth, who am I to worry about this. What is the High Court and the judiciary? Certainly, not the Chief Justice. The Constitution says, it is the Chief Justice and the Judges of the High Court. The judiciary does not in fact consist only of the Chief Justice and the Judges of the High Court. It consists of every member of the Bar and the staff. Everyone has something to do with the judiciary and why should I think that I alone am going to do this job. I had the immediate assurance of my brothers, the lawyers and the staff that they would do their best. It is their job as well. When they promised co-operation, I said 'no'. It is no co-operation. It is your job. So it is not my own responsibility. It is the responsibility of everyone of you. You know about the festival which we had a few days back in Mylapore, the pulling of the Ratha of the Lord. What does it signify? When you see the Ratha, you feel that humanly it is not possible to pull it. But, when so many

people apply their energy, the Ratha moves. That is the significance of the Ratha and we are now placed in the same position. If all of us could give a hand, there would be no difficulty in solving our problem and cleansing this High Court.

Mr. Advocate-General, it is indeed courageous of you to have brought to the notice of everyone the difficulty in which we are. Now you have talked on behalf of the Bar. We have been assured of the fullest co-operation of the Bar. Everyone of us is very anxious to keep aloof and avoid mixing with people unnecessarily. In the meantime, may I, on behalf of my brother Judges and the Court request the Bar to avoid the many things which you so plainly and bluntly talked about. So far as the work is concerned, the juniors and the seniors should try to prepare their cases well and present their points and help the Court to dispose of the work that is before it. There is a very long queue of litigants waiting. Well, they are all losing patience and losing confidence in us. So the bounden duty of the Bar is to prepare well. It will help their clients and help the Court and help the administration of justice. We have the fullest co-operation from the Bar. But we come across instances where without realising one's duties and responsibilities, rights are insisted upon. I am very happy that these instances are rare and need not be taken note of. We have found unstinted and unanimous co-operation from the Bar. We call upon you and we request you as members of the Bar to help us, to help your clients and to help the administration of justice. So far as we are concerned, we assure you that you will have the most courteous hearing. It is well-known that, if the Bar does not prepare well, the Courts cannot produce good judgments.

Well, I am happy we have had a frank talk though, of course, in an unusual and unorthodox manner. I thank you Mr. Advocate-General. It is only a man of your status that can do a bit of frank talking. I thank the members of the Bar and everyone that is present here. It may be, for a short period, I will be occupying this high office, but with the grace of God and your blessings and the co-operation of the Bar, the work which I am starting on this auspicious day, Sri Rama Navami Day, will be a success.

[END OF VOLUME (1976) 1 M.L.J. (JOURNAL).]

Ramanujam, J.

C. M. Janardhanam v. The Deputy Registrar of Co-operative Societies, Madras

2nd March, 1976. W.P. No. 3744 of 1975.

Tamil Nadu Co-operative Societies Act (LIII of 1961), *section* 28—*Co-operative Bank—Member of the Executive Committee—Obtaining overdraft from a Bank—Not repaid in time—Permission granted for repayment in instalments—Whether member suffered disqualification.*

A member of the executive committee obtained overdraft from another Co-operative Bank for one year. This was further extended upto 20th August, 1973. The member did not repay it on that date. The creditor Bank served a demand on 3rd October, 1973 and the member paid a sum of Rs. 400 on 10th October, 1973 and for the balance he requested for repayment in instalments. The creditor Bank granted this by its letter dated 9th November, 1973. On the question whether the member suffered a disqualification under section 28 of the Tamil Nadu Co-operative Societies Act,

Held, A default presupposes a demand by the creditor and non-compliance of that demand by the debtor. On these facts, there had been no default for more than three months in this case. The default commenced on the service of demand, by the Bank on 3rd October, 1973. By the Bank's permission granted on 9th November, 1973 the earlier default ceased though the liability as such continued to exist. There was no default in payment for a period of three months so that it could be said that the member suffered the disqualification.

T. S. Ramaswamy, for Petitioner.

S.J. *Petition dismissed.*

Ramanujam, J.

The Management of Prakash Mills (P.) Ltd. v. The Presiding Officer, Labour Court, Coimbatore

8th March, 1976. W.P. No. 934 of 1976.

Industrial Disputes Act (XIV of 1947), *section* 11-*A—Punishment of Workmen by Management—Reference to Labour Court—Scope of enquiry by Labour Court.*

Section 11-A of the Industrial Disputes Act, is wide enough to make the Labour Court to interfere with any order of punishment imposed by the Management on the ground that it is too severe, even if it is not motivated or vindictive. The section does not say that the Labour Court can interfere with the order of punishment only in cases where the order passed by the Management is an act of victimisation. It is true that the Labour Court must give reasons for the interference with the order of penalty imposed by the Management. Section 11-A gives the power to the Labour Court to set aside the order of discharge or dismissal and direct reinstatement of the workmen or to award a lesser punishment on such terms and conditions as it may think fit if it was satisfied that the order of discharge was not justified on the material.

King & Patridge, for Petitioner.

S.J. *Petition dismissed.*

[END OF VOLUME (1976) 1 M.L.J.(NOTES OF RECENT CASES.)]